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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

NO. 69,

THE INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

THE WESTERN & ATLANTIC RAILROAD CO., ET. AL., Appellees.

NO. 68,

THE INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

THE CLYDE STEAMSHIP COMPANY, THE GEORGIA RAILROAD COMPANY, ET. AL., Appellees.

NO. 70,

THE INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

THE CLYDE STEAMSHIP COMPANY, THE ATLANTA & WEST POINT RAILROAD COMPANY, THE WESTERN RAILWAY OF ALABAMA, ET. AL., Appellees.

Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

Argument of ED. BAXTER,

Solicitor for Appellees, as of Record.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

The Interstate Commerce Commission, Appellant,

vs.

The Western & Atlantic Railroad Company;
The Louisville & Nashville Railroad Company;
The Nashville, Chattanooga & St. Louis Railway Company;
The Cincinnati, New Orleans & Texas Pacific Railway Company, lessee of the Cincinnati Southern Railway;
The Cincinnati Southern Railway Company, and S. M. Felton, Receiver, Appellees.

No. 69.

The Interstate Commerce Commission, Appellant,

vs.

The Clyde Steamship Company;
The South Carolina Railway Company;
The Georgia Railroad & Banking Company;
The Louisville & Nashville Railroad Company, and the Central Railroad & Banking Company of Georgia, lessees of the Georgia Railroad;
The Richmond & Danville Railroad Company, and the Georgia Pacific Railway Company, lessees of the Central Railroad of Georgia;
D. H. Chamberlain, Receiver; H. M. Comer, Receiver; and Reuben Foster and F. W. Huidekoper, Receivers, Appellees.

No. 68.

The Interstate Commerce Commission, Appellant,

vs.

The Clyde Steamship Company;
The South Carolina Railway Company;
The Georgia Railroad & Banking Company;
The Louisville & Nashville Railroad Company, and the Central Railroad & Banking Company of Georgia, lessees of the Georgia Railroad;
The Richmond & Danville Railroad Company, and the Georgia Pacific Railway Company, lessees of the Central Railroad of Georgia;
The Atlanta & West Point Railroad Company, and the Western Railway Company of Alabama;
D. H. Chamberlain, Receiver; H. M. Comer, Receiver; and Reuben Foster and F. W. Huidekoper, Receivers, Appellees.

No. 70.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ARGUMENT OF ED. BAXTER,

SOLICITOR FOR APPELLEES, AS OF RECORD.

STATEMENT OF CASES.

I.

The above entitled cases were severally originated by petitions filed before the Interstate Commerce Commission against the respective appellees, by the Railroad Commission of Georgia.

The Interstate Commerce Commission sustained said petitions; and made certain orders against the respective defendants therein.

Said defendants, conceiving said orders to be illegal, declined to obey them; and the Interstate Commerce Commission filed separate petitions in the Circuit Court of the United States for the Northern District of Georgia to enforce said orders against the respective appellees.

Said Circuit Court declined to enforce said orders; and dismissed the petitions filed in that Court. The Interstate Commerce Commission appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the decrees of the Circuit Court; and the Interstate Commerce Commission appealed to this Court.

II.

The Petition Filed Before the Interstate Commerce Commission in Case No. 69.

The petition filed before said Commission in case No. 69 averred in substance:

That the rates of freight charged and collected by the appellees in that case from the city of Cincinnati and other Ohio River points to Marietta, Acworth, Cartersville, Kingston, Adairsville and Calhoun, Georgia, are more on each class than the amount charged and collected for freight to the city of Atlanta, which is a greater distance from the city of Cincinnati and other Ohio River points.

Trans. No. 69, pp. 6, 7.

That the transportation is of a like kind of through freight; that the transportation to Marietta, Acworth, Cartersville, Kingston, Adairsville and Calhoun is under substantially similar circumstances and conditions as the transportation to Atlanta; and that said appellees had not been authorized by said Commission to charge less for longer than for shorter distances for the transportation of said through freight.

Trans. No. 69, p. 6.

That the through rate charged and collected to Marietta, Acworth, Cartersville, Kingston, Adairsville and Calhoun "is unreasonable and discriminating in its nature" and in "violation of Section 4 of the Act of Congress, entitled 'An Act to Regulate Commerce.'"

Trans. No. 69, p. 7.

III.

The Answers Filed Before the Interstate Commerce Commission in Case No. 69.

Among the answers filed before said Commission in case No. 69 was that of the Louisville & Nashville Railroad Co., which denied in substance, that the transportation of like kind of freight is done under substantially similar circumstances and conditions, when done between points on the Ohio River and Atlanta, as when done between said Ohio River points and Marietta, Acworth, Cartersville, Kingston, Adairsville and Calhoun. On the contrary, it averred that the transportation to Atlanta is done under entirely different circumstances and conditions from those affecting transportation to Marietta, Acworth, Cartersville, Kingston, Adairsville and Calhoun.

Trans. No. 69, pp. 8, 9.

Said answer denied that the rates charged to Marietta, Acworth, Cartersville, Kingston, Adairsville and Calhoun are unreasonable or discriminating in their nature. On the contrary, it averred that they are fair and reasonable; and that they do not discriminate against any person or place.

Trans. No. 69, p. 9.

IV.

The Order Made by the Interstate Commerce Commission in Case No. 69.

The order made by said Commission in case No. 69 orders the appellees, the Louisville & Nashville Railroad Co., the Nashville, Chattanooga & St. Louis Railway Co., individually, and as lessee of and operating the Western & Atlantic Railroad, and the Cincinnati, New Orleans & Texas Pacific Railway Co., individually, or as lessee of and operating the Cincinnati Southern Railway, to cease and desist "from charging or receiving any greater compensation in the aggregate for the transportation of a like kind of property from Cincinnati and other points, called and known as Ohio River points, for the shorter distance to Calhoun, Adairsville, Kingston, Cartersville, Acworth, or Marietta, in the State of Georgia, than for the longer distance over the same line in the same direction, to Atlanta, in the State of Georgia, the shorter being included within the longer distance;" etc.

Trans. No. 69, p. 57.

V.

The Petition Filed Before the Interstate Commerce Commission in Case No. 68.

The petition filed before said Commission in case No. 68 averred in substance:

That the rates of freight charged and collected by the appellees in that case from the city of New York and other eastern points to Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain, Georgia, are more on each class than the amount charged and collected to the city of Atlanta, which is a greater distance from the city of New York and other eastern points.

Trans. No. 68, pp. 6, 7.

That the transportation is of a like kind of freight; that the transportation to Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain is under substantially similar circumstances and conditions as the transportation to Atlanta; and that said appellees had not been authorized by said Commission to charge less for longer than for shorter distances for the transportation of said through freight.

Trans. No. 68, p. 7.

That the through rate charged and collected to Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain "is unreasonable and discriminating in its nature," and in "violation of Section 4 of the Act of Congress, entitled, 'An Act to Regulate Commerce.'"

Trans. No. 68, pp. 7, 8.

VI.

The Answers Filed Before the Interstate Commerce Commission in Case No. 68.

Among the answers filed before said Commission in case No. 68, was that of the Georgia Railroad & Banking Co., the Louisville & Nashville Railroad Co., and the Central Railroad and Banking Co. of Georgia, which denied in substance that the transportation of like kind of freight is done under substantially similar circumstances and conditions when done between New York, Philadelphia, etc., and Atlanta, as when done between New York, Philadelphia, etc., and Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain.

Trans. No. 68, p. 9.

Said answer denied that the rates charged to Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain are unreasonable or discriminating in their nature. On the

contrary, it averred that they are fair; and that they do not discriminate against any person or place.

Trans. No. 68, p. 10.

VII.

The Order Made by the Interstate Commerce Commission in Case No. 68.

The order made by said Commission in case No. 68 orders the appellees, the Clyde Steamship Co., the South Carolina Railway Co., and D. H. Chamberlain, the Receiver thereof; the Georgia Railroad & Banking Co., the Louisville & Nashville Railroad Co., and the Central Railroad & Banking Company of Georgia, as lessees of the Georgia Railroad; H. M. Comer, Receiver of the Central Railroad & Banking Company of Georgia; the Richmond and Danville Railroad Company, and the Georgia Pacific Railway Co., as lessees of the Central Railroad of Georgia; and F. W. Huidekoper and Reuben Foster, Receivers of said Richmond & Danville Railroad Co.; that is to say such of them as are operating, as common carriers, the Clyde Steamship Line, the South Carolina Railway, and the Georgia Railroad, respectively, to cease and desist, "from charging or receiving any greater compensation in the aggregate for the transportation of a like kind of property from New York and other North Atlantic ports for the shorter distance to Greensboro, Madison, Social Circle, Covington, Conyers, or Stone Mountain, in the State of Georgia, than for the longer distance over the same line in the same direction to Atlanta, in the State of Georgia, the shorter being included within the longer distance;" etc.

Trans. No. 68, pp. 17, 18.

VIII.

The Petition Filed Before the Interstate Commerce Commission in Case No. 70.

The petition filed before said Commission in Case No. 70 averred in substance:

That the rates of freight charged and collected by the appellees in that case from the city of New York and other eastern points to West Point, LaGrange, Hogansville, Grantville, and Newnan, Ga., are more on each class than the amount charged and collected to the city of Opelika, which is a greater distance from the city of New York and other eastern points.

Trans. No. 70, p. 8.

That the transportation is of a like kind of freight; that the transportation to West Point, LaGrange, Hogansville, Grantville, and Newnan, is under substantially similar circumstances and conditions as the transportation to Opelika; and that said appellees had not been authorized by said Commission to charge less for longer than shorter distances for the transportation of said through freight.

Trans. No. 70, p. 7.

That the through rate charged and collected to West Point, LaGrange, Hogansville, Grantville, and Newnan is unreasonable and discriminating in its nature, and is in "violation of Section 4 of the Act of Congress, entitled 'An Act to Regulate Commerce.'"

Trans. No. 70, p. 8.

IX.

The Answers Filed Before the Interstate Commerce Commission in Case No. 70.

Among the answers filed before said Commission in case No. 70 was that of the Western Railway of Alabama, which denied in substance that the transportation of freight is done under substantially similar circumstances and conditions when done between New York and Opelika, as when done between New York and West Point, LaGrange, Hogansville, Grantville, and Newnan.

Trans. No. 70, p. 15.

Said answer denied that the rates charged to West Point, LaGrange, Hogansville, Grantville, and Newnan are unreasonable or discriminating in their nature.

Trans. No. 70, p. 15.

X.

The Order Made by the Interstate Commerce Commission in Case No. 70.

The order made by said Commission in case No. 70 orders the appellees, the Clyde Steamship Co., the South Carolina Railway Co., and D. H. Chamberlain, the Receiver thereof; the Georgia Railroad & Banking Co., the Louisville & Nashville Railroad Co., and the Central Railroad & Banking Company of Georgia, as lessees of the Georgia Railroad; H. M. Comer, Receiver of the Central Railroad & Banking Company of Georgia; the Richmond & Danville Railroad Co., and the Georgia Pacific Railway Co., as lessees of the Central Railroad of Georgia; F. W. Huidekoper and Reuben Foster, Receivers of said Richmond

& Danville Railroad Co., and the Atlanta & West Point Railroad Co.; that is to say, such of them as are operating, as common carriers, the Clyde Steamship Line, the South Carolina Railway, the Georgia Railroad, and the Atlanta & West Point Railroad, respectively, to cease and desist "from charging or receiving any greater compensation in the aggregate for the transportation of property from New York and other North Atlantic ports for the shorter distance to Newnan, Grantville, Hogansville, La-Grange, or West Point, in the State of Georgia, than they, together with the Western Railway Company of Alabama, charge or receive for the transportation of like kind of property from New York and other North Atlantic ports for the longer distance over the same line in the same direction to Opelika, in the State of Alabama, the shorter being included within the longer distance," etc.

Trans. No. 70, p. 20.

XI.

The Hearing Before the Interstate Commerce Commission.

Said cases, Nos. 69, 68, and 70, were heard, together with four other cases, by said Commission, and one report and opinion was filed by the Commission, in which it disposed of all seven of the cases.

A copy of said report and opinion will be found in Transcript No. 69, pp. 19 to 56; and also in 1 I. C. Rep., p. 121, under the style of Trammell vs. Clyde Steamship Co., et al.

Certain testimony was taken at said hearing which was considered by the Commission in each of said cases, so far as it was applicable thereto.

XII.

Proceedings in the Circuit Court of the United States.

The Interstate Commerce Commission filed a petition in the Circuit Court of the United States for the Northern District of Georgia, in each of the above entitled cases, to enforce the order of the Commission made therein.

The respective defendants to said petitions answered the same, denying the matters of equity therein alleged.

Additional testimony was taken in the Circuit Court, by each party, in each of said cases.

Under stipulation of counsel the testimony taken before the Commission was used in the Circuit Court in each of the above entitled cases, subject to objection as to its competency or relevancy in the particular case.

Trans. No. 69, pp. 73, 74.

XIII.

The Shorter and Longer Distance Points Involved in Case No. 69.

In case No. 69, the only shorter distance points involved are Calhoun, Adairsville, Kingston, Cartersville, Acworth and Marietta. They are all local stations on the line of the Western & Atlantic Railroad between Chattanooga and Atlanta. The only longer distance point involved in that case is Atlanta.

Trans. No. 69, p. 22, right col.

The defendants in that case insist that the transportation of property from Cincinnati, and other Ohio River points, to Atlanta, is not conducted under substantially similar circumstances

and conditions as the transportation of property from Cincinnati and other Ohio River points to Calhoun, Adairsville, Kingston, Cartersville, Acworth and Marietta.

XIV.

The Shorter and Longer Distance Points Involved in Case No. 68.

In case No. 68, the only shorter distance points involved are Greensboro, Madison, Social Circle, Covington, Conyers and Stone Mountain. They are all local stations on the line of the Georgia Railroad between Augusta and Atlanta. The only longer distance point involved in that case is Atlanta.

Trans. No. 69, p. 26, left col.

The defendants in that case insist that the transportation of property from New York and other North Atlantic ports to Atlanta is not conducted under substantially similar circumstances and conditions as the transportation of property from New York and other North Atlantic ports to Greensboro, Madison, Social Circle, Covington, Conyers and Stone Mountain.

XV.

The Shorter and Longer Distance Points Involved in Case No. 70.

In case No. 70, the only shorter distance points involved are Newnan, Grantville, Hogansville, LaGrange and West Point. They are all local stations on the line of the Atlanta & West Point Railroad between Atlanta and Opelika, Ala. The only longer distance point involved in that case is Opelika.

Trans. No. 69, p. 33, right col.

The defendants in that case insist that the transportation of property from New York and other North Atlantic ports to Ope-

lika is not conducted under substantially similar circumstances and conditions as the transportation of property from New York and other North Atlantic ports to Newnan, Grantville, Hogansville, LaGrange and West Point.

XVI.

The Circumstances and Conditions which Affect the Transportation of Property from Cincinnati to Atlanta.

In case No. 69, with reference to the circumstances and conditions which affect the transportation of property to Atlanta, the Interstate Commerce Commission, in its Report and Opinion, says that freight is carried from Cincinnati to Atlanta over the Louisville & Nashville Railroad from Cincinnati to Nashville, thence over the Nashville, Chattanooga & St. Louis Railway to Chattanooga, thence over the Western & Atlantic Railroad to Atlanta.

That it is also carried from Cincinnati to Chattanooga over the Cincinnati, New Orleans & Texas Pacific Railway, and thence over the Western & Atlantic Railroad to Atlanta.

Trans. No. 69, pp. 23, 24.

The Commission reports other lines which reach Atlanta from Cincinnati, as follows:

C., N. O. & T. P. Ry., Cincinnati to Chattanooga; thence via the East Tennessee, Virginia & Georgia Ry. to Atlanta.

L. & N. R. R. Cincinnati to Nashville; thence N., C. & St. L. Ry. to Chattanooga; thence E. T., V. & G. Ry. to Atlanta.

C., N. O. & T. P. Ry., Cincinnati to Chattanooga; thence Chatanooga, Rome & Columbus R. R., to Kramer; and thence Georgia Pacific Ry. to Atlanta.

L. & N. R. R., Cincinnati to Nashville; thence N., C. & St. L. Ry. to Chattanooga; thence C., R. & C. R. R. to Kramer; thence Ga. Pacific Ry. to Atlanta.

L. & N. R. R. to Jellico; thence E. T., V. & G. Ry. to Atlanta.

Trans. No. 69, p. 24, left col.

The Commission reports that:

"There is competition for the sale of commodities in Atlanta between Cincinnati and other cities, such as Boston, New York, Philadelphia and Baltimore, and the transportation from these Atlantic points is either all-rail, or water-and-rail by the Atlantic Coast Line, Seaboard Air Line, Richmond & Danville, Norfolk & Western, and East Tennessee and others. The water lines run to the ports of Norfolk, Portsmouth, Charleston, Savannah, Brunswick and possibly through Port Royal and Jacksonville. From these ports, Atlanta is reached by rail; the South Carolina & Georgia Roads from Charleston, the Central of Georgia, the Savannah, Florida & Western and East Tennessee from Savannah; the East Tennessee from Brunswick; the Port Royal & Augusta Railway from Port Royal, the Queen & Crescent and Louisville & Nashville run from New Orleans; and Mobile stands on similar footing."

"There are also rail lines from various Mississippi and Ohio River points, which compete for Atlanta trade, such as Vicksburg, Greenville, Memphis, Cairo, Paducah, Evansville and Louisville."

Trans. No. 69, p. 24, left and right cols.

The Commission also reports that:

"The present adjustment of rates to Atlanta is the outcome of severe competition between lines leading from competing markets like St. Louis, Baltimore, Cincinnati, etc., and with some modifications occurring from time to time, has been in effect for a considerable period."

Trans. No. 69, p. 24, right col., and 25 left col.

In the testimony taken in the Circuit Court in case No. 69, the following witnesses enumerate various transportation lines which actually and actively compete, and which actually and actively competed in 1892, as well from Ohio River points as from other sections of the country, for the transportation to Atlanta of freight classified as 1, 2, 3, 4, 5, 6, A, B, C, D, E, H and F:

van den Berg, Trans. No. 69, pp. 112-114.
Culp, Trans. No. 69, pp. 124-126.
Brown, Trans. No. 69, pp. 148-151.
Lutz, Trans. No. 69, pp. 160-162.
Winburn, Trans. No. 69, pp. 168-169.
Knox, Trans. No. 69, pp. 176-179.
Biles, Trans. No. 69, pp. 188-190.

Witness Thompson files a statement of the tonnage carried from the eastern seaboard and interior points in New England, New York, Pennsylvania, Maryland, Delaware, and West Virginia to Atlanta, Ga., during the year ended March 31, 1893; and said statement shows the various competing lines by which said tonnage was carried.

Trans. No. 69, pp. 135, 205.

Said witness also files a classified statement of tonnage carried from points on and beyond the Ohio and Mississippi Rivers, and from and via Lexington, Ky., and from Nashville, Tenn., Johnsonville, Tenn., and Florence, Sheffield and Riverton, Ala., to Atlanta, Ga., during the year ended March 31, 1893; and said statement shows the various competing lines by which said tonnage was carried.

Trans. No. 69, pp. 135, 203.

The statements filed by said Thompson show that the competition for the transportation of freight of the various classes to Atlanta affects a vast volume of traffic; and they show the result of the competition between the various lines which reach Atlanta, by showing the proportion which those lines have respectively carried of the competitive traffic.

XVII.

The Circumstances and Conditions which Affect the Transportation of Property from Cincinnati to Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta.

In case No. 69, with reference to the circumstances and conditions, which affect the transportation of property, from Cincinnati and other Ohio River points to the shorter distance points in that case, viz.: Calhoun, Adairsville, Kingston, Cartersville, Acworth and Marietta, the Interstate Commerce Commission reports that the Rome Railroad connects Kingston, Ga., with the East Tennessee, and Central of Georgia, at Rome, Ga. That from Marietta, the Marietta & North Georgia Railroad runs northerly 204 miles to Knoxville, Tenn., where it connects with the East Tennessee line, and also with the Knoxville, Cumberland Gap & Louisville Railroad, which extends 72 miles to Middlesboro, Ky., and there meets the Louisville & Nashville system, by which Cincinnati can be reached over a distance of 230 miles from Middlesboro. That from Cartersville, Ga., the East & West Railroad of Alabama runs westerly to Rock Mart, 22 miles, connecting with the East Tennessee, and 16 miles farther, it reaches the Central of Georgia, at Cedartown. The Commission says:

"Competition has not forced rates down at Kingston, Marietta or Cartersville. No railroad other than the Western & Atlantic runs to Calhoun, Adairsville, or Acworth."

Trans. No. 69, p. 25, left col.

In the testimony taken in the Circuit Court in case No. 69, the following witnesses testify that there is no such competition at Calhoun, Adairsville, Kingston and Acworth as is sufficient to

affect the rates charged by the two rail lines from Cincinnati and other Ohio River points to those stations. That at Cartersville and Marietta there is a slight indirect competition, but not of such a character as is sufficient to affect the rates charged by the direct rail line.

Brown, Trans. No. 69, p. 151.
Lutz, Trans. No. 69, p. 163.
Knox, Trans. No. 69, p. 181.
Biles, Trans. No. 69, p. 191.

The following witnesses testify in case No. 69 that there is strong competition existing from Cincinnati to Chattanooga, and that the rates fixed by that competition are used in making the rates from Cincinnati to Calhoun, Adairsville, Kingston, Cartersville, Acworth and Marietta; but that the same competition does not exist at those stations as at Atlanta.

Culp, Trans. No. 69, p. 127.
van den Berg, Trans. No. 69, pp. 114-115.

XVIII.

The Circumstances and Conditions which Affect the Transportation of Property from New York to Atlanta.

In case No. 68, with reference to the circumstances and conditions which affect the transportation of property from New York and other North Atlantic ports to Atlanta, the Interstate Commerce Commission, in its Report and Opinion says:

"The facts before stated with reference to the Chattanooga-Atlanta route in regard to competing lines for Atlanta traffic, including free delivery of freights at that point, apply also to this route," i. e., the route from New York via Augusta to Atlanta.

Trans. No. 69, p. 26, right col.

I have already shown in Section XVI. of this argument the facts that were stated by the Commission with reference to the circumstances and conditions which affect the transportation of property from Cincinnati and other Ohio River points to Atlanta; and as the Commission, in effect, admits that the same facts obtain with reference to the circumstances and conditions which affect the transportation of property from New York and other north Atlantic ports to Atlanta, I will not consume time and space in repeating those facts in this section.

In the testimony taken in the Circuit Court in case No. 68, the following witnesses enumerate various transportation lines which actually and actively compete, and which actually and actively competed in 1892, as well from New York and other north Atlantic ports, as from other sections of the country, for the transportation to Atlanta of freight classified as, 1, 2, 3, 4, 5, 6, A, B, C, D, E, H and F:

van den Berg, Trans. No. 68, pp. 62, 63, 64.
Culp, Trans. No. 68, pp. 82, 83, 84.
Compton, Trans. No. 68, pp. 92, 93, 94, 95, 96, 97.
Brown, Trans. No. 68, pp. 123, 124, 125.
Lutz, Trans. No. 68, pp. 131, 132.
Winburn, Trans. No. 68, pp. 139, 140.
Knox, Trans. No. 68, pp. 147, 148, 149, 150.
Biles, Trans. No. 68, pp. 158, 159, 160.

Witness Thompson in case No. 68 files a statement of tonnage carried from the eastern seaboard and interior points in New England, New York, Pennsylvania, Maryland, Delaware, and West Virginia to Atlanta, Ga., during the year ended March 31, 1893; and said statement shows the various competing lines by which said tonnage was carried.

Trans. No. 69, pp. 135, 205.

Said witness also files a classified statement of tonnage carried from points on and beyond the Ohio and Mississippi Rivers, and

from and via Lexington, Ky., and from Nashville, Tenn., Johnsonville, Tenn., and Florence, Sheffield and Riverton, Ala., to Atlanta, Ga., during the year ended March 31, 1893; and said statement shows the various competing lines by which said tonnage was carried.

Trans. No. 69, pp. 135, 136, 203, 204.

The statements filed by said Thompson show that the competition for the transportation of freight of the various classes to Atlanta affects a vast volume of traffic; and they show the result of the competition between the various lines which reach Atlanta, by showing the proportions which those lines have respectively carried of the competitive traffic.

XIX.

The Circumstances and Conditions which Affect the Transportation of Property from New York to Greensboro, Madison, Social Circle, Covington, Conyers and Stone Mountain.

In case No. 68 with reference to the circumstances and conditions which affect the transportation of property from New York and other North Atlantic ports to the shorter distance points in that case, viz.: Greensboro, Madison, Social Circle, Covington, Conyers and Stone Mountain, the Interstate Commerce Commission reports that:

"Of the intermediate points mentioned, namely, Greensboro, Madison, Social Circle, Conyers, Covington and Stone Mountain, only two, Madison and Social Circle, are junction points. At Madison, the Georgia Railroad connects with the branch of the Richmond & Danville running between Macon and Lula on the Atlanta & Charlotte Division of the main line. The distance from Lula to Madison is 72 miles; the distance from Lula to

Atlanta by the Richmond & Danville is 66 miles; practically the same distance. At Social Circle, the Georgia Railroad connects with the Gainesville, Jefferson & Southern Railroad, which extends from Social Circle to Gainesville, a distance of 52 miles, where it connects with the Atlanta & Charlotte Division of the Richmond & Danville line. The distance from Atlanta to Gainesville by the Richmond & Danville is 53 miles, about the same as from Social Circle to Gainesville." . . . "The fact that different lines run to these two points has not compelled reductions in rates thereto, but it was stated in evidence that the fact of direct railroad connection between Madison and Macon would soon be likely to cause a lowering of rates to Madison, the short water-and-rail route from New York being through Brunswick and Macon.

Trans. No. 69, p. 27, left and right cols.

In the testimony taken in the Circuit Court in Case No. 68, the following witnesses testify that there is no such competition at Greensboro, Madison, Social Circle, Covington, Conyers, or Stone Mountain, as there is at Atlanta; though the competition which compels existing rates to Augusta and Atlanta is recognized in fixing rates to Greensboro, Madison, Social Circle, Covington, Conyers and Stone Mountain; and so far as the carriage from New York and other north Atlantic ports to Atlanta and Augusta is concerned, traffic to said local points is as competitive as if destined to stop at Atlanta or Augusta proper.

van den Berg, Trans. No. 68, pp. 64, 65.

Davant, Trans. No. 68, p. 76.

Culp, Trans. No. 68, p. 84.

Brown, Trans. No. 68, p. 125.

Lutz, Trans. No. 68, p. 133.

Knox, Trans. No. 68, p. 151.

Biles, Trans. No. 68, p. 161.

XX.

The Circumstances and Conditions which Affect the Transportation of Property from New York to Opelika.

In case No. 70, with reference to the circumstances and conditions which affect the transportation of property from New York and other North Atlantic ports to Opelika, Ala., the Interstate Commerce Commission in its Report and Opinion says:

"The route here is water and rail from New York and other North Atlantic ports via the Clyde Steamship Line to Charleston, the South Carolina Railway to Augusta, the Georgia Railroad to Atlanta and the Atlanta & West Point and Western Railway of Alabama to the destinations mentioned in the complaint, which are Newnan, Grantville, Hogansville, LaGrange and West Point, shorter distance stations, and Opelika, the longer distance point."

Trans. No. 69, p. 33, right col.

"The distance by the Central of Georgia from Savannah to Atlanta is 295 miles, 13 miles less than the distance from Charleston to Atlanta. The distance from Savannah to Augusta by the Central of Georgia is 132 miles, 5 miles less than the mileage from Charleston to Augusta by the South Carolina Road. The distance from Savannah to Opelika by the Central of Georgia through Macon and Columbus is 321 miles, 26 miles less than the distance to Newnan, the first shorter distance point over the route from Charleston, and only 13 miles greater than the distance from Charleston to Atlanta. The Central of Georgia route, Savannah to Opelika, is with the exception of the 29 miles from Columbus, wholly in the State of Georgia. Freights can be shipped by the Central of Georgia from Savannah, through Opelika to West Point and LaGrange, and carried over a less distance than by the route from Charleston or the

route from Savannah, through Augusta or Atlanta. It is only 6 miles farther to Hogansville via Savannah and Opelika than from Charleston; only 20 miles greater distance to Grantville, and but 44 miles farther to Newnan. There is a still shorter route from Savannah to Opelika, namely, the Central of Georgia to Lyons, 75 miles, the Savannah, Americus & Montgomery, called the 'Sam' road, to Americus, 124 miles, and the Central System to Opelika, 93 miles, or 292 miles in all. It is a less distance by this route from Savannah through Opelika to all the shorter distance stations named in the complaint, except Newnan, than from Charleston.

"From the port of Brunswick, Ga., Opelika can be reached by the Savannah, Florida & Western to Albany, 169 miles, and the Central of Georgia to Opelika, 124 miles, or a distance of 298 miles through. It is nearer from Brunswick via Opelika to all the shorter distance points in this case, except Newnan, than to these points from Charleston, via Atlanta, and it is only 21 miles farther to Newnan from Brunswick than from Charleston.

"But Savannah traffic can also reach Newnan by the Central of Georgia to Griffin and its Chattanooga Division over a short distance of 288 miles, 7 miles less than the distance from Savannah to Atlanta, and 20 miles less than from Charleston to Atlanta."

Trans. No. 69, p. 34, left and right cols.

"As shown by the findings applicable to this route, water and rail lines through Savannah and Brunswick can reach all the shorter distance points through Opelika, the longer distance point, except Newnan, over a shorter rail mileage than by this route from Charleston. The water lines to Savannah and Brunswick do not touch at Charleston, and the difference in distance by water from New York and other points to Charleston, Savannah or Brunswick is in view of the low cost of water carriage too inconsiderable to affect the merits of the case. The actual

routing of the freight over these competing routes, which also reach Atlanta, and one of them, Newnan, by direct lines from the seaboard, is not shown, they not being parties to the case. We assume that it would be for the advantage of the Central road taking freight from steamer at Savannah for West Point, or even LaGrange, to route it through Opelika, the longer distance point in this case, for its carrying distance would be longer than by delivering at Atlanta or Newnan."

Trans. No. 69, p. 55, left and right cols.

In his testimony given in case No. 70, Mr. Lutz states that the distance from New York to Opelika via steamship to Charleston, Augusta and Atlanta is 668 miles; that the distance from New York to Opelika via Charleston, Augusta, Macon, and the Central of Georgia Railway is 642 miles; that the distance from New York to Opelika via Ocean to Savannah and the Central of Georgia Railway is 570 miles; that the distance from New York to Opelika via Ocean to Savannah and thence via the Georgia & Alabama (formerly the Savannah, Americus & Montgomery) Railway to Americus, and thence by the Central of Georgia Railway is 542 miles; and that the distance from New York to Opelika via Ocean to Brunswick and via the Brunswick & Western Railroad and Columbus Southern (now a part of the Georgia & Alabama Railroad) and the Central of Georgia Railway is 548 miles.

Trans. No. 70, p. 115.

In the testimony taken in the Circuit Court in case No. 70, the following witnesses enumerate various transportation lines, which actually and actively competed in 1892, and now compete, as well from New York and other north Atlantic ports, as from other sections of the country, for the transportation to Opelika of freight classified as 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, and F:

Culp, Trans. No. 70, pp. 66, 67, 68.

van den Berg, Trans. No. 70, pp. 78, 79, 80.

Compton, Trans. No. 70, pp. 95, 96, 97, 98, 99.

Brown, Trans. No. 70, pp. 108, 109.
Lutz, Trans. No. 70, pp. 114, 115, 116.
Knox, Trans. No. 70, pp. 124, 125.
Biles, Trans. No. 70, pp. 142, 143.

Witness Hunter, in his testimony in case No. 70, states that the tonnage from eastern cities to Opelika for the year ended March 31, 1896, was carried to that point by the following lines and in the following proportions:

Via Savannah and the Central Railway, 45.3%; via Montgomery and the Western Railway, 24.1%; the Clyde Line, via Charleston and the Georgia Railroad and Atlanta & West Point Railroad, 1.1%; other lines with the Georgia Railroad and the Atlanta & West Point, 1.6%; the Southern Railway and Atlanta & West Point Railroad, 24.6%; Seaboard Air Line and Atlanta & West Point Railroad, 3.3%.

Trans. No. 70, p. 136.

XXI.

The Circumstances and Conditions which Affect the Transportation of Property from New York to Newnan, Grantville, Hogansville, LaGrange and West Point.

In case No. 70, with reference to the circumstances and conditions which affect the transportation of property from New York and other North Atlantic ports to the shorter distance points in that case, namely, Newnan, Grantville, Hogansville, LaGrange and West Point, witnesses whose testimony was taken in the Circuit Court in that case, testify that at Newnan, the Central Railway is the only railroad besides the Atlanta & West Point Railroad.

Knox, Trans. No. 70, p. 131.
Hunter, Trans. No. 70, p. 138.

Culp, Trans. No. 70, p. 71.
van den Berg, Trans. No. 70, p. 82.
Compton, Trans. No. 70, p. 107.

The witnesses testify that at LaGrange, the Macon & Birmingham Railroad is the only railroad besides the Atlanta & West Point Railroad.

Knox, Trans. No. 70, p. 131.
Hunter, Trans. No. 70, p. 138.
Culp, Trans. No. 70, p. 72.
van den Berg, Trans. No. 70, p. 82.
Compton, Trans. No. 70, p. 107.

At Grantville and Hogansville, there is no railroad other than the Atlanta & West Point Railroad.

van den Berg, Trans. No. 70, p. 81.
Compton, Trans. No. 70, p. 107.

At West Point, the Atlanta & West Point Railroad and the Western Railway of Alabama are the only railroads; and they are under a common management and control.

van den Berg, Trans. No. 70, p. 81.

The witnesses testify in case No. 70, that there is no competition existing at Newnan, Grantville, Hogansville, LaGrange and West Point to affect rates, like the competition which exists at Opelika.

Brown, Trans. No. 70, p. 110.
Lutz, Trans. No. 70, p. 118.
Biles, Trans. No. 70, p. 144.

They testify, however, that in fixing rates from eastern cities to Grantville, Hogansville, and West Point, the competition that forces the existing rates to Atlanta and Opelika has been recognized; and that so far as the carriage from New York and other North Atlantic ports to Atlanta or Opelika is concerned, traffic

for Grantville, Hogansville and West Point is as competitive as if it were destined to Atlanta or Opelika proper.

van den Berg, Trans. No. 70, pp. 81, 82.

In other words, the witnesses mean to say with reference to traffic shipped from New York and other north Atlantic ports destined to Grantville, Hogansville and West Point, that its carriage from New York and other north Atlantic ports to Atlanta, or Opelika, is as competitive for that distance, as if it were destined to stop at Atlanta or Opelika.

XXII.

How Rates are Made from Cincinnati to Atlanta.

In case No. 69, with reference to how rates are made from Cincinnati and other Ohio River points to Atlanta, the Commission reports that:

"The present adjustment of rates to Atlanta is the outcome of severe competition between lines leading from competing markets like St. Louis, Baltimore, Cincinnati, etc., and with some modifications occurring from time to time, has been in effect for a considerable period."

Trans. No. 69, p. 24 right col., and p. 25 left col.

XXIII.

How Rates are Made from Cincinnati to Calhoun, Adairsville, Kingston, Cartersville, Acworth and Marietta.

In case No. 69, with reference to how rates are made from Cincinnati and other Ohio River points, to the shorter distance points in that case, viz.: Calhoun, Adairsville, Kingston, Cartersville, Acworth and Marietta, the Interstate Commerce Commission reports that:

The " charges to all points north of Atlanta and south of Chattanooga are combinations of established rates to Chattanooga and local rates of the Western & Atlantic from Chattanooga " to said shorter distance points, respectively.

Trans. No. 69, p. 23, left col.

The following witnesses testify in case No. 69, that various transportation lines actually and actively compete for the transportation of freight from Cincinnati to Chattanooga:

van den Berg, Trans. No. 69, p. 112.
Culp, Trans. No. 69, pp. 124, 125.
Brown, Trans. No. 69, p. 143.
Lutz, Trans. No. 69, pp. 159, 160.
Knox, Trans. No. 69, p. 175.
Biles, Trans. No. 69, p. 188.

The following witnesses testify in case No. 69, that, in their opinion, the rates from Cincinnati to Chattanooga are just and reasonable; and they set forth their reasons for the opinions so expressed:

van den Berg, Trans. No. 69, p. 112.
Culp, Trans. No. 69, p. 125.
Brown, Trans. No. 69, p. 143.
Lutz, Trans. No. 69, p. 160.
Knox, Trans. No. 69, p. 175.
Biles, Trans. No. 69, p. 188.

Witness Brown testifies in case No. 69 that the rates charged by the Western & Atlantic Railroad from Chattanooga to Western & Atlantic local stations are in accordance with the standard tariff rate of the Railroad Commission of Georgia. That upon only three roads in the State of Georgia is the Standard tariff operated, namely, the Western & Atlantic Railroad, the Rome Railroad (operated by the Western & Atlantic R. R.), and the Georgia Railroad. All other roads in Georgia (except the Rome R. R. and the Georgia R. R.), are allowed certain percentages

of increase over the standard tariff except on certain classes; and those increases range from 10 to 50 per cent. Trans. No. 69, pp. 138, 139. Or to state it differently, the other railroads in Georgia (except the Rome R. R. and the Georgia R. R.), are allowed by the Commission of that State to charge from 10 to 50 per cent. more (except upon certain classes) than the Western & Atlantic Railroad is allowed to charge. In a word, the combination rates from Cincinnati and other Ohio River points to the shorter distance points involved in case No. 69, viz.: Calhoun, Adairsville, Kingston, Cartersville, Acworth and Marietta are made by adding the severely competitive rates which prevail from Cincinnati and other Ohio River points to Chattanooga (and which, owing to that competition, are very low) to the local rates of the Western & Atlantic Railroad from Chattanooga to destination, which local rates are (except upon certain classes) from 10 to 50 per cent. less than those charged by any other railroad in Georgia, except the Rome Railroad and the Georgia Railroad.

The following witnesses testify in case No. 69, that the combination rates from Cincinnati to said shorter distance points are, in their opinion, just and reasonable, and they state the reasons for the opinions which they express:

van den Berg, Trans. No. 69, pp. 111, 112.
Culp, Trans. No. 69, p. 124.
Brown, Trans, No. 69, pp. 140, 141.
Lutz, Trans. No. 69, p. 159.
Winburn, Trans. No. 69, p. 168.
Knox, Trans. No. 69, p. 174.
Biles, Trans. No. 69, p. 188.

The Court will notice that the local stations on the Western & Atlantic Railroad which are involved in case No. 69 have the benefit of all the competition which exists at Chattanooga, though the nearest one of those stations is 60 miles distant from

Chattanooga; and that the real ground of complaint in case No. 69 is that these stations are not also given the benefit of the competition at Atlanta, though the nearest one of those stations is 21 miles north of Atlanta.

Persons living at Calhoun, Adairsville, Kingston, Cartersville, Acworth and Marietta would be perfectly willing to pay combination rates made by adding the very low competitive rates from Cincinnati to Chattanooga, to the local rates fixed by the Georgia Railroad Commission from Chattanooga to those local stations, respectively, were it not for the fact that the same line is carrying the same kind of property through those local stations to Atlanta, a farther distant point, for less rates than are charged from Cincinnati and other Ohio River points to those local stations. In other words, their complaint is not that the rates charged them are too high, but that the rates charged to Atlanta are too low, as compared with their rates.

XXIV.

How Rates are Made from New York to Atlanta.

In case No. 68, with reference to how rates are made from New York and other North Atlantic ports to Atlanta, the Interstate Commerce Commission, in its Report and Opinion, says:

"There is competition for the sale of commodities in Atlanta between Cincinnati and other cities, such as Boston, New York, Philadelphia, and Baltimore, and the transportation from these Atlantic points is either all-rail, or water-and-rail by the Atlantic Coast Line, Seaboard Air Line, Richmond & Danville, Norfolk & Western, and East Tennessee and others. The water lines run to the ports of Norfolk, Portsmouth, Charleston, Savannah, Brunswick, and possibly through Port Royal and Jacksonville. From these ports, Atlanta is reached by rail; the South Carolina and Georgia roads from Charleston, the Central of Georgia, the

Savannah, Florida & Western, and East Tennessee from Savannah; the East Tennessee from Brunswick; the Port Royal & Augusta Railway from Port Royal," etc.

Trans. No. 69, p. 24, left and right cols.

The Commission also reports that:

"The present adjustment of rates to Atlanta is the outcome of severe competition between lines leading from competing markets like St. Louis, Baltimore, Cincinnati, etc., and with some modifications occurring from time to time, has been in effect for a considerable period."

Trans. No. 69, p. 24 right col. and 25 left col.

XXV.

How Rates are Made from New York to Greensboro, Madison, Social Circle, Covington, Co[illegible], and Stone Mountain.

In case No. 68, with reference to how rates are made from New York and other North Atlantic ports to the shorter distance points in that case, viz.: Greensboro, Madison, Social Circle, Covington, Conyers, and Stone Mountain, the Interstate Commerce Commission reports that:

"Rates to points intermediate between Augusta and Atlanta are combination rates, made up of rates to the terminal points, with locals added. Charges to these intermediate points are based as follows: Greensboro and Madison on the Augusta rate; Social Circle, classes 1 and B, on Atlanta; classes 3, 4, 5, 6, A, C, D, E, H and F, on Augusta, class 2 on either Augusta or Atlanta; Covington, classes 1, 2, 3, A and B, on Atlanta, the others on Augusta; Conyers, classes 1, 2, 3, 4, A, B and H, on Atlanta, classes 6, C, D, E and F, on Augusta, and class 3 (?) on either; Stone Mountain, classes D and F, on Augusta, class C on either, and the other classes on Atlanta.

" When rates are based on Atlanta, they consist of the charge through the point of destination to Atlanta plus the local back."

Trans. No. 69, p. 26, right col.

In case No. 68, it is proven that the rates from New York and other North Atlantic ports to Greensboro, Madison, Social Circle, Covington, Conyers and Stone Mountain are made upon the lowest obtainable combination, Atlanta or Augusta governing, as the case may be, as the base point. In other words, in the adjustment of totals, the local points are given the benefit of the competition which compels the existing rates to Augusta and Atlanta, respectively, and also the benefit of the rates fixed by the Georgia Railroad Commission to be charged by the Georgia Railroad from Augusta or Atlanta, respectively, to those local points.

van den Berg, Trans. No. 68, p. 62.
Davant, Trans. No. 68, p. 74.
Culp, Trans. No. 68, p. 82.
Brown, Trans. No. 68, pp. 123, 124.
Winburn, Trans. No. 68, p. 139.

The following witnesses testify in case No. 68, that the combination rates from New York and other North Atlantic ports to Greensboro, Madison, Social Circle, Covington, Conyers and Stone Mountain are, in their opinion, just and reasonable, and they state the reasons for the opinions which they express:

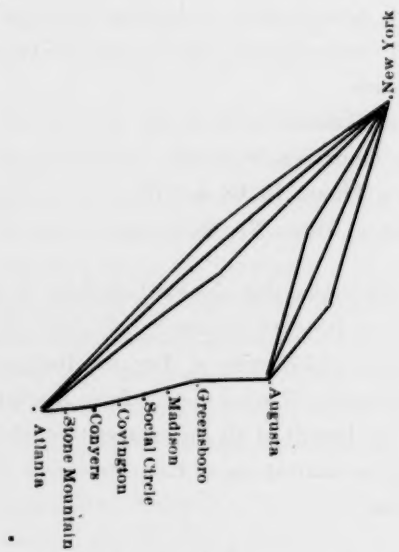
van den Berg, Trans. No. 68, p. 62.
Davant, Trans. No. 68, p. 74.
Culp, Trans. No. 68, p. 82.
Compton, Trans. No. 68, p. 93.
Brown, Trans. No. 68, pp. 123, 124.
Lutz, Trans. No. 68, pp. 130, 131.
Winburn, Trans. No. 68, p. 139.
Knox, Trans. No. 68, p. 147.
Biles, Trans. No. 68, pp. 158, 159.

It is proven in case No. 68 that the rates from New York and other North Atlantic ports to Augusta and Atlanta are controlled by water competition to and through the ports of Savannah and Brunswick.

Davant, Trans. No. 68, p. 76.
Culp, Trans. No. 68, p. 84.
Brown, Trans. No. 68. p. 126.
Winburn, Trans. No. 68, p. 141.

The Court will notice that the local stations on the Georgia Railroad which are involved in case No. 68, have the benefit of all the competition which exists at Augusta, though the nearest one of those stations is 83 miles distant from Augusta; and that they also have the benefit of all the competition which exists at Atlanta, though the nearest one of those stations is 16 miles distant from Atlanta.

The following diagram sufficiently illustrates the situation involved in case No. 68, it being remembered that there are numerous competing routes from New York to Atlanta, as well as from New York to Augusta; some of which competing lines are all-rail, and some of them part water and part rail, and in the case of Augusta, one of them is all-water, (via the ocean and the Savannah River).



A mere glance at said diagram is sufficient to show that persons living at Greensboro, Madison, Social Circle, Covington, Conyers and Stone Mountain, in shipping from New York, via Augusta, would be perfectly willing to pay combination rates made by adding the very low competitive rates from New York and other North Atlantic ports to Augusta, to the local rates fixed by the Georgia Railroad Commission from Augusta to those local stations, respectively, were it not for the fact that the same line is carrying the same kind of property through those local stations to Atlanta, a farther distant point, for less rates than are charged from New York and other North Atlantic ports, via Augusta, to those local stations. In other words, their real complaint is, not that the rates charged them are too high, but that the rates charged to Atlanta are too low as compared with their rates.

In this connection, it will be remembered that the local rates of the Georgia Railroad, prescribed by the Railroad Commission of Georgia, are what are termed the Georgia Standard Rates, and that only three roads in the State are required to use the standard rates, viz.: the Western & Atlantic Railroad, the Rome Railroad, and the Georgia Railroad. All other roads in that State are allowed by the Georgia Railroad commission to use rates that are higher than the standard rates.

Trans. No. 68, pp. 123, 124.

Persons living at the local stations on the Georgia Railroad which are involved in case No. 68, not only have a choice between the very low competitive rates prevailing at Augusta and Atlanta, respectively, but they have also the benefit of lower local rates to those stations from Augusta or Atlanta, respectively, than are charged by any other road in Georgia except the Western & Atlantic Railroad and the Rome Railroad.

XXVI.

How Rates are Made from New York to Opelika.

In case No. 70, with reference to how rates are made from New York and other North Atlantic ports to Opelika, in the testimony taken in the Circuit Court in case No. 70, the following witnesses enumerate various transportation lines, which actually and actively competed in 1892, and now compete, as well from New York and other North Atlantic ports as from other sections of the country for the transportation to Opelika of freight classified as 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, and F:

Culp, Trans. No. 70, pp. 66, 67, 68.
van den Berg, Trans. No. 70, pp. 78, 79, 80.
Compton, Trans. No. 70, pp. 95, 96, 97, 98, 99.
Brown, Trans. No. 70, pp. 108, 109.

Lutz, Trans. No. 70, pp. 115, 116.
Knox, Trans. No. 70, pp. 124, 125.
Biles, Trans. No. 70, pp. 142, 143.

Witness Hunter, in his testimony in case No. 70, states that the tonnage from eastern cities to Opelika for the year ended March 31, 1896, was carried to that point by the following lines and in the following proportions:

Via Savannah and the Central Railway, 45.3%; via Montgomery and the Western Railway, 24.1%; the Clyde Line via Charleston and the Georgia Railroad and Atlanta & West Point Railroad, 1.1%; other lines with the Georgia Railroad and the Atlanta & West Point 1.6%; the Southern Railway and Atlanta & West Point Railroad 24.6%; Seaboard Air Line and Atlanta & West Point Railroad 3.3%.

Trans. No. 70, p. 136.

XXVII.

How Rates are Made from New York to Newnan, Grantville, Hogansville, LaGrange and West Point.

In case No. 70, with reference to how rates are made from New York and other North Atlantic ports to the shorter distance points in that case, viz.: Newnan, Grantville, Hogansville, LaGrange and West Point, the testimony taken in the Circuit Court in that case shows that the rates from New York and other North Atlantic ports to Grantville, Hogansville, and LaGrange are combination rates, made up of the rates from New York and other North Atlantic ports to Atlanta and the local rates of the Atlanta & West Point Railroad from Atlanta to destination.

Lutz, Trans. No. 70, p. 119.

On the first six classes, the rates to West Point are combination rates, made up of the rates from New York and other North

Atlantic ports to Opelika and the local rates of the Western Railway of Alabama from Opelika to destination.

Lutz, Trans. No. 70, p. 119.

Rates to Newnan are less than any combination that can be made either on Atlanta or Opelika.

van den Berg, Trans. No. 70, p. 81.

Mr. Lutz testifies in case No. 70 that the local rates charged by the Atlanta & West Point Railroad from Atlanta to Newnan, Grantville, Hogansville, LaGrange and West Point are exactly and identically the rates that said company is directed and ordered to charge by the Georgia Railroad Commission, and are practically the same as are charged for similar distances by other roads in the State of Georgia.

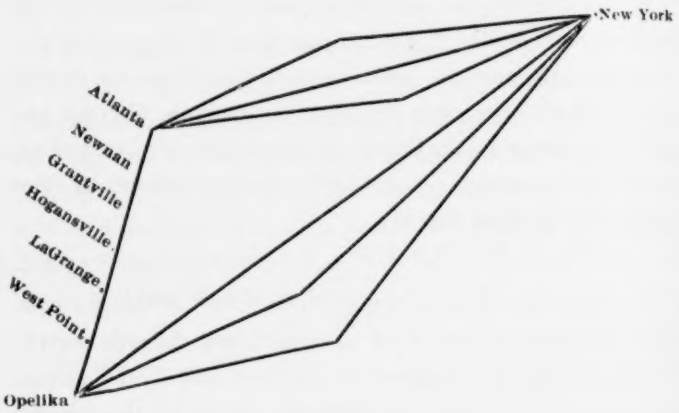
Trans. No. 70, p. 114.

The following witnesses testify, in case No. 70, that the combination rates from New York and other North Atlantic ports to Newnan, Grantville, Hogansville, LaGrange and West Point are just and reasonable, and they state the reasons for the opinions which they express:

Lutz, Trans. No. 70, p. 116.
Culp, Trans. No. 70, pp. 68, 69.
van den Berg, Trans. No. 70, p. 81.
Compton, Trans. No. 70, p. 99.
Brown, Trans. No. 70, p. 110.
Knox, Trans. No. 70, p. 126.
Biles, Trans. No. 70, p. 144.

The Court will notice that the local stations on the Atlanta & West Point Railroad which are involved in case No. 70, have the benefit of all the competition which exists at Atlanta, though the nearest one of those stations is 39 miles distant from Atlanta; and that they also have the benefit of all the competition which exists at Opelika, though the nearest one of those stations is 22 miles distant from Opelika.

The following diagram sufficiently illustrates the situation involved in case No. 70, it being remembered that there are numerous competing routes from New York to Opelika, as well as from New York to Atlanta; some of which competing routes are all-rail and some of them part-water and part-rail:



A mere glance at said diagram is sufficient to show that persons living at Newnan, Grantville, Hogansville, LaGrange and West Point, in shipping from New York, via Atlanta, would be perfectly willing to pay combination rates made by adding the very low competitive rates from New York and other North Atlantic ports to Atlanta and the local rates fixed by the Georgia Railroad Commission from Atlanta to those local stations respectively, were it not for the fact that the same line is carrying the same kind of property through those local stations to Opelika, a farther distant point, for less rates than are charged from New York and other North Atlantic ports to those local stations.

XXVIII.

ARGUMENT.

The Section of the Act to Regulate Commerce Upon which the Orders Made by the Commission in These Cases Were Based.

The Commission did not base the orders made by it in these cases either upon the first section, which relates to the reasonableness of rates, nor upon the second section, which relates to unjust discrimination in rates, nor upon the third section, which relates to unjust prejudice in rates. The Commission based said orders upon the fourth section alone, it being the section which relates to charging more for a short than for a long haul.

The material parts of the orders have been heretofore copied in Sections IV., VII. and X. of this argument, and they show upon their face that said orders are based alone upon what is known as the long and short haul clause of the fourth section. They enjoin the defendants in the respective cases to cease and desist "from charging or receiving any greater compensation in the aggregate for the transportation of a like kind of property" for a "shorter distance" (to certain designated local stations) "than for the longer distance over the same line in the same direction" (to a certain designated farther distant point), "the shorter being included within the longer distance." The words in quotation marks are taken literally from the long and short haul clause of the fourth section, and they cannot be found in any other section of the Act. Every other issue that might have been decided by the Commission was treated by it as subordinate, or at least as "subsidiary" to the issue which was made upon the fourth section. Upon this point the Commission says:

"In view of the fact that the issues present mainly a single

question of violation of the fourth section, the decision of which will also involve the disposition of the *subsidiary* matters of unreasonable and discriminating rates alleged and denied herein, it seems unnecessary to further analyze the pleadings."

Trans. No. 69, p. 22, right col.

Again, the Commission says:

"As these cases all stand upon the charge of violation of the long and short haul clause, the fourth section of the Statute, it becomes necessary to consider whether the defendants are justified in their conceded disregard of the prohibitive part of the provision. The point of the defense is that the transportation for shorter distances is under circumstances and conditions which are substantially dissimilar to those surrounding the transportation to the longer distance points; and this upon the assumption that they may, in any case, determine the question for themselves in the first instance."

Trans. No. 69, p. 38, left col.

The Commission then enters upon an exhaustive discussion of the meaning of the phrase, "substantially similar circumstances and conditions;" and that discussion is continued through many pages of the Report and Opinion.

A mere reading of the Report and Opinion, however carelessly or carefully it may be done, is sufficient to satisfy any one that the Commission intended to base its orders in these cases alone upon the long and short haul clause of the fourth section.

XXIX.

The Orders Made by the Commission in These Cases Are Not Lawful Under the Fourth Section of the Act.

The Commission reports that:

"There is competition for the sale of commodities in Atlanta between Cincinnati and other cities, such as Boston, New York, Philadelphia and Baltimore, and the transportation from these Atlantic points is either all rail, or water and rail, by the Atlantic Coast Line, Seaboard Air Line, Richmond & Danville, Norfolk & Western, and the East Tennessee and others."

Trans. No. 69, p. 24, left col.

Again the Commission says:

"The Queen & Crescent and Louisville & Nashville run from New Orleans; and Mobile stands on similar footing."

"There are also rail lines from various Mississippi and Ohio River points, which compete for Atlanta trade, such as Vicksburg, Greenville, Memphis, Cairo, Paducah, Evansville and Louisville."

Trans. No. 69, p. 24, right col.

Again, the Commission says:

"The present adjustment of rates to Atlanta is the outcome of severe competition between lines leading from competing markets like St. Louis, Baltimore, Cincinnati, etc., and, with some modifications, occurring from time to time, has been in effect for a considerable period."

Trans. No. 69, pp. 24 right col., and 25 left col.

Again the Commission says:

"The strife for trade between different markets seeking trans-

portation for like commodities to the same locality is undoubtedly one of the most potent commercial forces of our time."

Trans. No. 69, p. 48 left col.

It will be noticed that the Commission concedes that there exists at Atlanta not only competition between carrier and carrier, but also competition between market and market. It will be noticed that the Commission concedes that competition between different markets is one of the most potent commercial forces of our time; and that the present adjustment of rates to Atlanta is not only affected by competition, but is in fact the "outcome of severe competition" between two or more competing railroads leading from the same market to Atlanta, or between competing railroads leading to Atlanta from two or more competing markets.

In Section XX. of this argument I have shown that at Opelika, also, there is competition between carrier and carrier, and between market and market.

The Commission holds, however, that "the competition of carriers *subject to the Act to Regulate Commerce* does not create circumstances and conditions which the carriers can take into account in determining for themselves, in the first instance, whether they are justified, under the fourth section, in charging more for shorter than for longer distances over their lines."

Trans. No. 69, p. 20, head note No. 6.

The Commission also holds that:

"The competition of markets on different lines (of transportation) for the sale of commodities at a given point served by both lines does not create circumstances and conditions which the carriers can take into account in determining for themselves in the first instance whether they are justified, under the fourth section, in charging more for shorter than for longer distances over their lines."

Trans. No. 69, p. 20, head note No. 7.

In the case of the Interstate Commerce Commission vs. Alabama Midland Railway Co., this Court says:

"We are unable to suppose that Congress intended by the fourth section, and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do," etc.

168 U. S., p. 169.

175 U. S., 669, Louisville, etc., R. R. Co. vs. Behlmer.

Again this Court says:

"That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the Act to Regulate Commerce, has been held by many of the Circuit Courts."

I. C. C. vs. Ala. Midland Ry. Co., 168 U. S., p. 164.

93 Fed. Rep., p. 87, I. C. C. vs. W. & A. R. R. Co. et al.

175 U. S., 667, Louisville, etc., R. R. Co. vs. Behlmer.

It will be seen that this Court overruled the doctrine announced by the Commission in these cases to the effect that "the competition of carriers subject to the Act to Regulate Commerce, does not create circumstances and conditions which the carriers can take into account in determining for themselves, in the first instance, whether they are justified under the fourth section in charging more for shorter than for longer distances over their lines." As this Court has overruled the construction which the Commission placed upon the fourth section, and upon which construction the Commission based the orders made by it in these cases, I submit that those orders are not lawful under the fourth section.

The Commission in its Eleventh Annual Report, in comment-

ing upon the decision of this Court in the Alabama Midland Case, says:

"The defendants (i. e. in the Alabama Midland Case) insisted that the fact of *railway competition* at Montgomery made the circumstances and conditions at Troy and at Montgomery dissimilar, and that, therefore, the inhibition of the fourth section did not apply. The Commission had held in many previous cases, and held in this case (i. e., the Alabama Midland Case), that *railway competition* between carriers *subject to the provisions of the Act* could not of itself create the necessary dissimilarity in circumstances and conditions. This contention is not sustained by the Supreme Court, which holds that such competition does create that dissimilarity, and that the higher rate to Troy is not prohibited by the fourth section."

The italics are mine.

11 Ann. Rep., I. C. C. (1897), p. 43.

Again, the Commission says:

"That section (i. e., the fourth) enacts that the carrier shall not charge more for the short than for the long haul under substantially similar circumstances and conditions. If the circumstances and conditions are similar, the greater charge cannot be made. If the circumstances and conditions are not similar, the section does not apply. The Court holds (i. e. in the Alabama Midland Case) that *railway competition* of controlling force makes the circumstances dissimilar. If, therefore, we find in a particular case that competition of controlling force actually exists, that ends the matter. We have no power to say whether, nor to what extent, such competition justifies the higher rate to the intermediate point."

11 Ann. Rep., I. C. C. (1897), p. 43.

Again, the Commission says:

"On November 8, 1897, the Supreme Court held, in the case

entitled Interstate Commerce Commission vs. Alabama Midland Ry. Co. et al. (the Troy Case, 168 U. S., ——-), that *railroad competition* may create discriminating (dissimilar?) circumstances and conditions under the fourth section and thereby justify greater charges for the shorter haul."

11 Ann. Rep., I. C. C. (1897), p. 91.

In the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et al., decided December 31, 1897, the Commission in speaking of the defense relied upon in certain instances in that case, says:

"In all other instances, the justification relied upon is the existence of railway competition between carriers subject to the Act to Regulate Commerce. The Commission has uniformly held, up to the present time, that this species of competition does not create the necessary dissimilarity of circumstances and conditions under that section, and such would have been its decision in this case upon the law as it was supposed to be when the findings of fact were prepared. Since then, however, the Supreme Court of the United States by its decision in the case, *Interstate Commerce Commission vs. Alabama M. R. Co.*, decided November 8th, 1897, 168 U. S., 144, 42 L. Ed. ——, has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law as applied to the facts found in this case, we are of the opinion that the charging of a higher rate to the intermediate points, as set forth, is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply and the carrier is not bound to regard it in the making of its tariffs. The Court has decided

that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate at the intermediate point and the higher rate is not prohibited by the fourth section."

7 I. C. Rep., pp. 479, 480, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et al.

175 U. S., 670, Louisville, etc., R. R. Co. vs. Behlmer.

It will be seen that the Commission expressly concedes that the doctrine announced by it in the cases at bar, to the effect that the competition of carriers subject to the Act to Regulate Commerce does not create circumstances and conditions which the carriers can take into account, has been overruled by this Court in the Alabama Midland case.

XXX.

The Fourth Section Continued.

Counsel for appellant will doubtless rely upon the opinion of Judge Severens in the case of Interstate Commerce Commission vs. East Tennessee, Virginia & Georgia Railroad Co. et al. (known as the Chattanooga Board of Trade case), 85 Fed. Rep., p. 117.

In that case Judge Severens, referring to the decision of the Commission in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., et al., says that the Commission, "evidently disheartened by the adverse rulings of the Supreme Court in recent cases," . . . "seems to give up section 4 as of no force or effect in any case where the conditions are not 'substantially similar.'"

85 Fed. Rep., 117.

The Judge, after referring to the language quoted by me, in the last preceding section of this argument, from the decision of the Commission in that case, says:

"Now, I do not understand that such a conclusion follows from that decision (i. e., the decision of the Supreme Court in the Alabama Midland Railway case). On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination, whether the conditions are similar, and if dissimilarity is found, *then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of.* . . . In other words, my opinion is that the restraint of *section 4* is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and that it is competent, *under that section,* to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

I. C. C. vs. E. T. V. & G. Ry. Co., et al., 85 Fed. Rep., p. 118.

I respectfully submit that there is manifest error in Judge Severens' construction of the fourth section. It is a construction which has never been given to that section by any other court; nor by the Commission in any of its decisions. The material part of section 4 is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

In Re Southern Ry. & S. S. Association (sometimes cited as In Re L. & N. R. R. Co.), 1 I. C. Rep., p. 280, Judge Cooley in speaking of the effect of the introduction into the fourth section of the phrase, "under substantially similar circumstances and conditions," said:

"Here we have clearly stated what is unlawful and forbidden; and for doing the unlawful and forbidden act penalties are then provided. But that which the act does not declare unlawful must remain lawful if it were so before; and that which it fails to forbid, the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, SINCE IF THE CIRCUMSTANCES AND CONDITIONS OF THE TWO HAULS ARE DISSIMILAR THE STATUTE IS NOT VIOLATED."

This language of Judge Cooley was quoted approvingly by Judge Ross, in the case of I. C. C. vs. A. T. & S. F. R. R. Co., 50 Fed. Rep., pp. 300, 301; and see Behlmer vs. L. & N. R. R. Co., 71 Fed. Rep., p. 839; Brewer & Hanleiter vs. Central of Georgia Railway Co., 84 Fed. Rep., p. 261; I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., pp. 168, 169; Louisville, etc., R. R. Co. vs. Behlmer, 175 U. S., pp. 667, 668.

Judge Severens is right in saying that the Commission "seems to give up section 4 as of no force or effect in any case *where the conditions are not substantially similar;*" but he is mistaken in supposing that the Commission's yielding of its position was due to the Commission being "disheartened by the adverse ruling of the Supreme Court in recent cases." It will be seen that In Re Southern Ry. & S. S. Association referred to above, and which was one of the very first cases decided by the Com-

mission, the Commission speaking through Judge Cooley gave "up section 4 as of no force or effect in any case *where the conditions are not substantially similar.*"

His language in that case was that "if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated."

The construction of the fourth section suggested for the first time by Judge Severens, would, if sound, require an amendment of the fourth section such as is indicated by capitals in the following paragraph:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; AND EVEN WHERE THE CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY DISSIMILAR, SUCH DISSIMILARITY MUST BE IN DUE PROPORTION TO THE EXISTING DISPARITY IN RATES."

His Honor's construction is:

"That the restraint of Section IV. is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates;" and it is impossible to put that construction upon the fourth section unless, by judicial legislation, the Court adds to the language of that section some such provision as is indicated by capitals in the preceding paragraph.

In the case of the United States vs. Trans-Missouri Freight Association, this Court refused to read into the Anti-Trust Act an exception or provision which altered the natural meaning of the language used; and that too upon a material point.

166 U. S., 329.

The construction which Judge Severens proposes to put upon the fourth section is new, but it is not useful; because, if the disparity in rates between the shorter and longer distance points be such as to constitute an undue preference in favor of the latter, or an undue prejudice against the former, relief can be given under the third section of the Act. If, however, the disparity does not constitute any undue preference in favor of the longer distance points, nor any undue prejudice against the shorter distance points, it does no harm to any one; and it ought not to be prohibited, as it is proposed to do, by the judicial amendment suggested by Judge Severens.

The Commission, in its Eleventh Annual Report, commenting upon the decision of this Court in the Alabama Midland case, upon the fourth section, says:

"If the circumstances and conditions are similar, the greater charge cannot be made. IF THE CIRCUMSTANCES AND CONDITIONS ARE NOT SIMILAR, THE SECTION DOES NOT APPLY. The Court holds that railway competition of controlling force makes the circumstances dissimilar. IF, THEREFORE, WE FIND, IN A PARTICULAR CASE, THAT COMPETITION OF CONTROLLING FORCE ACTUALLY EXISTS, THAT ENDS THE MATTER. WE HAVE NO POWER TO SAY WHETHER, NOR TO WHAT EXTENT, SUCH COMPETITION JUSTIFIES THE HIGHER RATE TO THE INTERMEDIATE POINT."

"THE THIRD SECTION IS STILL LEFT, AND UNDER THAT SECTION WE MAY INQUIRE WHETHER, UNDER ALL THE CIRCUMSTANCES, THE RATES AS ADJUSTED GIVE AN UNDUE PREFERENCE TO THE COMPETITIVE POINT, but the fourth section is, by this decision, eliminated from the Act."

11 Ann. Rep., I. C. C. (1897), p. 43.

The Commission is wholly mistaken in supposing that the fourth section is eliminated from the Act by the decision of this Court in the Alabama Midland Railway case. If the circum-

stances and conditions are substantially similar, then, under the fourth section, the carrier is prohibited from charging more for a short than for a long haul, *whether the disparity in rates does or does not give an undue preference to the longer distance point.* If, however, the circumstances and conditions are substantially dissimilar, while the fourth section can have no operation, the third section remains operative, and under that section, the Court can decide whether the disparity in rates constitutes an undue preference in favor of the longer distance point, or an undue prejudice against the shorter distance point.

In the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., the Commission again commenting upon the decision of this Court in the Alabama Midland Ry. case upon the fourth section, says:

"The section declares that the carrier shall not make the higher charge to the nearer point under 'subsantially similar circumstances and conditions.' IF THE CONDITIONS AND CIRCUMSTANCES ARE NOT SUBSTANTIALLY SIMILAR, THEN THE SECTION (i. e., THE FOURTH) DOES NOT APPLY, and the carrier is not bound to regard it in the making of its tariff. The Court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate to the intermediate point, and the higher rate is not prohibited by the *fourth* section."

"WHETHER THOSE RATES ARE IN VIOLATION OF THE THIRD SECTION, IN THAT THEY GIVE AN UNDUE PREFERENCE TO THE MORE DISTANT POINT, IS A DIFFERENT QUESTION, WHICH MIGHT ARISE IN CASES OF THIS KIND."

7 I. C. Rep., pp. 479, 480, Savannah Bureau of Freight and Transportation vs. Charleston & Savannah Ry. Co., et al.

In all cases where a greater charge is made for a shorter than for a longer haul, the whole question can, according to Judge Severens, be settled under the fourth section; and the third section, under his construction, is, in such cases, of no value whatever.

But, according to the construction which the Commission puts upon the decision of this Court in the Alabama Midland Ry. case, and which construction, *in that respect*, is I think the correct one, IF THE CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY DISSIMILAR THE FOURTH SECTION DOES NOT APPLY; BUT THE THIRD SECTION REMAINS, AND, UNDER THAT SECTION, IT MAY BE DETERMINED WHETHER THE DISPARITY IN RATES CONSTITUTES AN UNDUE PREFERENCE OF THE LONGER DISTANCE POINT.

Judge Severens is mistaken in supposing that the Commission is "disheartened by defeat," or that its comments upon the decision of this Court are the mere exclamations of a panic stricken fugitive. On the contrary, the Commission, with a clear conception of what this Court has decided in reference to the fourth section, has fallen back upon the third and first sections of the Act; and the opinion of the Commission in the recent case of Calloway vs. L. & N. R. R. Co., et al., 7 I. C. Rep., p. 431, unmistakably indicates that the Commission intends to use the third and first sections in the future, in all cases of a greater charge for a shorter distance, where the circumstances and conditions are substantially dissimilar; and where, for that reason, the fourth section has no application.

It may be argued by opposing counsel that Judge Severens' construction of the fourth section finds some support in the following language used by this Court in the Alabama Midland Railway Case:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its

character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the question of 'undue or unreasonable preference or advantage,' or 'what are substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases, there is no absolute rule which prevents the Commission or the Courts from taking that matter into consideration."

168 U. S., p. 167.

Surely nothing can be found in the language just quoted to sustain Judge Severens in his proposition, that *though the circumstances and conditions may be substantially dissimilar, the "restraint of section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates."*

This Court, in saying that "we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections," did not intend to intimate that either section contains any such restraint as that the rates must be "upon the scale of comparison between the dissimilarity of conditions and the disparity of rates." The only restraint contained in the fourth section is that the carrier shall not charge more for a shorter than for a longer haul under substantially similar circumstances and conditions; and this Court, in saying that the mere fact of competition, no matter what its character or extent, does not necessarily relieve the carrier from the restraint of the fourth section, means that competition which is "artificial or merely conjectural," or which is not "material and substantial," or in which the public has no interest, shall not be taken

into consideration at all, as a circumstance or condition affecting the transportation. 175 U. S., 674, 675, Louisville, etc., R. R. Co. vs. Behlmer. If, however, the competition be real "material and substantial, thereby operating on the question of traffic and rate-making," and if it subserves the public interest, as well as that of the carrier, it may be taken into consideration, and in such a case, it will relieve the carrier from the restraint of the fourth section, i. e., from charging more for a shorter than for a longer haul. 175 U. S., 674, 675, Louisville, etc., R. R. Co. vs. Behlmer. But the restraint of the third section remains, and if the disparity in rates constitutes an undue preference of the longer distance points, the rates may be declared unlawful under the restraint of that section; notwithstanding they may not offend against the restraint of the fourth section at all.

Judge Severens seems to doubt the soundness of his own construction of the fourth section, and to concede that it may become necessary to fall back upon the third section. His language is:

"But the long and short haul clause is only one of the specific provisions employed for the general purpose of the Act. The third section underlies the fourth and supplies the principles on which it rests; so that if the literal construction referred to be put upon the fourth section, the case would still be exposed to the third section, which forbids undue preference to one locality or the subjection of another to any undue disadvantage."

85 Fed. Rep., p. 117.

The only error in the language just quoted consists in the proposition that "the third section underlies the fourth and supplies the principles on which it rests."

The third section does not underlie the fourth. The third section covers ground which is entirely distinct from that which is covered by the fourth section. The *third* section does not prohibit *any* preference *unless it is undue or unreasonable;*

while the *fourth* section prohibits a greater charge for the shorter than for the longer distance, if the circumstances and conditions be substantially similar, *whether such disparity of rates does or does not constitute an undue or unreasonable preference of the longer distance point.*

XXXI.

The Fourth Section Continued.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., et al., referred to above, Judge Severens uses this language:

"Conceding that some allowance should be made for the conditions at Nashville (the longer distance point), the rigor of the rule of the long and short haul clause of the fourth section, moderated to some extent, *as it was held might be done in the case of the Commission vs. the Alabama Midland Railway Company,* 168 U. S., 144, the disproportion in the present case is too gross."

85 Fed. Rep., pp. 112, 113.

The italics are mine.

I respectfully deny that it was held, or even intimated by this Court in the Alabama Midland Railway Case, that "the rigor of the rule of the long and short haul clause of the fourth section" could be "moderated to some extent," or to any extent.

The case was decided upon the ground that the long and short haul clause of the fourth section *did not apply at all;* and not upon the ground that "the rigor" of that clause had been properly or improperly "moderated." If the circumstances and conditions are substantially similar, and a greater charge is made for a shorter than for a longer distance, etc., no court has the power to "moderate" the rigor of the fourth section to the

slightest extent. If, in such a case, the charge to the shorter distance point exceed the charge to the longer distance point, even to the extent of the fraction of a cent, such charge is absolutely prohibited by the fourth section; and no power is vested in any court to moderate the rigor of the prohibition.

The carrier, upon application to the Commission, may in special cases be relieved from the operation of the fourth section; but as no application has been made to the Commission for relief in the cases at bar, it is unnecessary to discuss the question whether the Commission would, upon such an application, have the power to moderate the rigor of the fourth section; or whether it would be limited to granting or refusing full absolution. But whatever power the Commission might have under a special application for relief, it is certain that in a case where no application for relief has been made to the Commission, no Court has the right to moderate to any extent whatever the rigor of the long and short haul clause, in any case to which it applies.

XXXII.

The Fourth Section Continued.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., et al., referred to above, Judge Severens, in commenting upon the decision of this Court in the Alabama Midland case, uses this language:

"*Both the courts below had concurred in holding that the Commission was wrong in thinking the disparity of charges was too great in view of the facts,* and the Supreme Court did not find sufficient reason for reversing their decree."

85 Fed. Rep., p. 114.

The italics are mine.

I respectfully deny that either the Circuit Court, or the Court

of Appeals, decided the Alabama Midland Railway Case upon the ground that the Commission was wrong *" in thinking the disparity of charges was too great."* Neither of those courts intimated that " the restraint of section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates."

That " scale of comparison " was invented for the first time by Judge Severens; and neither the Circuit Court, nor the Court of Appeals, attempted to use it in the Alabama Midland Railway Case. Both of those courts decided that case on the ground that the circumstances and conditions were substantially dissimilar, and therefore *that the fourth section did not apply at all.* And neither of them attempted to discuss the question as to whether " the rigor of that section had been properly, or improperly, ' moderated ' by the Commission."

See the Opinion of the Circuit Court in the Alabama Midland Ry. Case, 69 Fed. Rep., 227 to 233; and the opinion of the Circuit Court of Appeals in 74 Fed. Rep., 715 to 733.

XXXIII.

The Fourth Section Continued.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. referred to above, Judge Severens said:

" The Supreme Court in that case, (i. e., the Alabama Midland Ry. case) while reaffirming the doctrine that competition between railway carriers might, and frequently ought to be, considered in adjusting rates under the long and short haul clause, yet took pains to prevent the inference from its opinion that it (competition) should be regarded as a *controlling* consideration."

85 Fed. Rep., p. 114.

I respectfully deny that this Court "took pains to prevent the inference that competition should be regarded as a *controlling* consideration." On the contrary, I insist that the very point decided by this Court in the Alabama Midland Ry. case was that where competition is such that it can be properly considered, it *is* to be allowed to *control* in the making of rates.

I will hereinafter show that the competition at the longer distance points involved in these cases is "such as, having due regard for the interests of the public and of the carrier, ought justly to have effect upon the rates;" and therefore that it can be properly considered. And I will hereinafter show that if the competition be such as can be properly considered at all, it must, of necessity, be allowed to *control* in fixing rates at competitive points.

There can be no middle course. The courts must hold either that competition *can* be considered, or that it *cannot* be considered, in fixing competitive rates.

If they hold that it cannot be considered in fixing competitive rates, then the short rail lines, and the water lines will have a monopoly of the transportation business of the country. If, on the other hand, the courts adhere to the doctrine decided by this Court in the Alabama Midland Ry. case, and in the Behlmer case, that competition, such as affects rates, and such as subserves the interest of the public as well as of the carrier, may be considered in fixing competitive rates, then such competition must, of necessity, *control* in the fixing of those rates. All competing lines, however numerous they may be, must accept the lowest rates offered by any one of them, or all but one of them must abandon the competitive traffic altogether.

XXXIV.

The Fourth Section Continued

In the case of I. C. C. vs. E. T. V. & G. R'y Co., referred to above, Judge Severens said:

"As the circumstances vary infinitely and constantly in the course of such business, it would seem that Congress must have intended something unusual and peculiar, out of the ordinary course, not ordinarily incident to the business, as that which would create a substantial dissimilarity; for otherwise, the vast bulk of transportation would not be subject to the rule at all."

85 Fed. Rep., p. 114.

The inference which counsel for appellant will seek to draw from the language just quoted is, that as competition between railroads which are subject to the Act to Regulate Commerce is "ordinarily incident to the business," and therefore not "unusual," or "peculiar," it cannot create a "substantial dissimilarity" within the purview of the fourth section.

If counsel's construction of his Honor's language is correct, his Honor has fallen into the very error for which the Commission was reversed in the Alabama Midland R'y case, and in the Behlmer case.

In the opinion delivered by the Commission in the Alabama Midland R'y case, it was said:

"No attempt is made to establish substantial dissimilarity of circumstances and conditions at Montgomery on the ground of rail competition further than by proof of the fact that there are a number of railway lines running to and through that city connecting with different parts of the country. This alone, it is scarcely necessary to say, is not sufficient. Re Louisville &

Nashville R. R. Co., 1 Inters. Com. Rep., 278, 1 I. C. C. Rep., p. 31."

4 Inters. Com. Rep., p. 355, left col. Board of Trade vs. Alabama Midland R. Co.

It will be noticed that the Commission in deciding the question of rail competition in the Alabama Midland R'y case, based its opinion upon its previous decision In Re Louisville & Nashville R. R. Co.

In Re Louisville & Nashville R. R. Co. (sometimes cited as Re Southern Railway & Steamship Association), 1 Inters. Com. Rep., p. 278, it was held by the Commission that where railroads are subject to the Act to Regulate Commerce, competition between them could not be considered except in *"rare and peculiar cases."*

1 Inters. Com. Rep., p. 278, right col., 5th head note, par. (c).

In the Alabama Midland Ry. case, there was no pretense that there was anything "rare," or "peculiar," or "unusual" in the competition between the various railroads which centered at Montgomery. It was conceded that all of said railroads were subject to the Act to Regulate Commerce; and the very question which this Court was asked to decide in that case was whether the competition between those rail lines at Montgomery, all of which were confessedly subject to the Act to Regulate Commerce, could properly be taken into consideration in fixing competitive rates to and from Montgomery.

While there was a question of fact in the Alabama Midland Ry. case as to whether there was any water competition at Montgomery, there was no question of law in that case as to whether water competition could be taken into consideration.

The Commission itself, in one of its earliest cases, had decided that water competition, and competition between rail carriers *not* subject to the Act to Regulate Commerce could be taken into

consideration. It had also decided that competition, even between rail carriers subject to the Act, could be taken into consideration *"in rare and peculiar cases."*

1 Inters. Com. Rep., p. 278, right col., 5th head note.
In Re Southern R'y & S. S. Association.

None of those questions, therefore, were raised in the Alabama Midland Ry. case. The question raised in that case was whether competition between rail carriers subject to the Act, could be considered, *where there was nothing "rare," "unusual," or "peculiar" in it; and where it was in no wise different from other ordinary rail competition.* This Court decided in that case, that if the competition be such as to affect rates, and such as subserves the public interest as well as the interest of competing carriers, it may be taken into consideration, notwithstanding all of the competing rail carriers are subject to the Act to Regulate Commerce, and notwithstanding there be nothing "rare," "unusual," or "peculiar" in the competition.

See also 175 U. S., Louisville, etc., R. R. Co. vs. Behlmer.

XXXV.

The Fourth Section Continued.

Counsel for appellant may refer to the fact that certain witnesses testified that at the time the Act to Regulate Commerce was passed, and prior thereto, and since, the greater charge for the shorter than the longer haul, etc., only existed in cases of competition in transportation to the longer distance point; and he may argue that, as Congress knew this fact, it did not intend that competition in transportation should be an excuse in *all* cases, but only in certain *extreme* cases.

I concede that Congress did not intend that competition in transportation should be an excuse "in *all* cases."

I also concede that Congress did not intend that competition should be an excuse in any case, except where "the interests of the public as well as of the carrier demand it."

But I contend that where "the interests of the public as well as of the carrier" *do* demand it, Congress *did* intend that competition should be an excuse.

175 U. S., 674, 675, Louisville, etc., R. R. Co. vs. Behlmer.

I deny that the cases in which competition subserves the interests of the public, as well as of the carriers, are "extreme," "unusual," "rare," or "peculiar." On the contrary, I insist that the interests of the public are usually subserved by the existence of legitimate competition; and I will hereinafter show that the competition at the longer distance points involved in this case subserves the interests of the public, as well as of the carriers.

XXXVI.

The Fourth Section Continued.

In the case of I. C. C. vs. E. T., V. & G. Ry. Co., referred to above, Judge Severens said that the argument of counsel for the carriers in that case was, in effect, that "the *extent* of the discrimination must be confided to the judgment of the railroad officials, whose ability and experience best qualify them for the task," and that "there is nothing for the Commission or the Court to do but to take notice of the fact that the conditions are dissimilar, and abandon all further inquiry."

85 Fed. Rep., p. 117.

His Honor misapprehended my argument in that case. I have never claimed that "the extent of the discrimination" must be confided to the judgment of railroad officials; nor have I ever denied the right of either the Commission, or the Court, to review the judgment of railroad officials, on any question.

My argument in that case was, as it is in these cases, that where the existence of competition at a longer distance point is such as to create a substantial dissimilarity between the circumstances and conditions which exist at that point, and those which exist at shorter distance points, neither railroad officials, nor commissions, nor courts, can determine "the extent of the discrimination" by any such "scale of comparison between the dissimilarity of conditions and the disparity of rates" as was suggested by Judge Severens in that case.

My contention was, and is, that "the *extent* of the discrimination" *determines itself*. If the rates to the shorter distance points be reasonable within the purview of the first section; if no undue discrimination, or undue preference be brought about; and if material and substantial competition forces lower rates to some longer distance point, there is but one question submitted either to the carrier, the Commission, or the Court, and that is whether it will subserve the public interest, as well as the carrier's interest, for the carrier to compete at such longer distance point.

175 U. S., pp. 674, 675, Louisville, etc., R. R. Co. vs. Behlmer.

The decision of that question must, of necessity, be made by the carrier in the first instance. But the carrier's decision is made at his peril, and may be reviewed either by the Commission, or the Court. But if the Commission, or the Court agrees with the carrier that it will subserve the public interest, as well as the interest of the carrier, for the carrier to compete at the longer distance point, then "the extent of the discrimination" *will*

determine itself; and it will amount to exactly the difference between the reasonable rates charged to the shorter distance points, and the lower rates forced by competition to be charged at the longer distance point;—whatever that difference may happen to be.

XXXVII.

The Orders Made by the Commission in These Cases Are Not Lawful Under the Third Section of the Act.

The third section of the Act to Regulate Commerce was modeled upon the second section of the English Railway and Canal Traffic Act of 1854, and upon section 11 of the English Railway and Canal Traffic Act of 1873. For the convenience of Court, I print in parallel columns so much of said sections as are material for the present purpose:

UNDUE PREFERENCE CLAUSE.	UNDUE PREFERENCE CLAUSE.
English Act.	*American Act.*
Sec. 2. Railway and Canal Traffic Act, 1854.—1 *Nev. & Mac., p.* 2.	Sec. 3. Act to Regulate Commerce.
Sec. 11. Railway and Canal Traffic Act, 1873.—1 *Nev. & Mac., p.* 11.	That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any *undue* or *unreasonable* preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.—24 *U. S. Stat. at Large, p.* 380.
. . . . And no such company shall make or give any *undue* or *unreasonable* preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.—1 *Nev. & Mac, pp.* 2–11.	

In the case of Interstate Commerce Commission vs. Baltimore & Ohio Railroad Co., Mr. Justice Brown, speaking for this Court, said:

"It is not all discriminations or preferences that fall within the inhibition of the statute; *only such as are unjust or unreasonable.*" . . . "Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."

145 U. S., pp. 276, 277, I. C. C. vs. B. & O. R. R.

In the case of Interstate Commerce Commission vs. Alabama Midland Railway Co., Judge Bruce said:

"The words 'any undue or unreasonable preference or advantage' plainly imply that every preference or advantage is not condemned, *but such, only, as are undue or unreasonable.*"

69 Fed. Rep., pp. 231, 232.

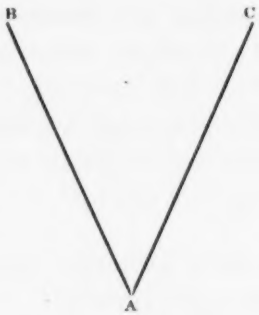
In the case of the Commercial Club of Omaha vs. Chicago & N. R. Co., decided November 18, 1897, the Commission, speaking through Commissioner Knapp, said:

"It must be remembered that not every inequality in rates constitutes a violation of the law. *Discrimination is forbidden only when it is unjust. Preferences and prejudices are not prohibited unless they are undue.* The language of the statute implies that there may be discriminations which are not unjust and preferences which are not undue."

7 I. C. Rep., p. 404.

It goes without saying that where lower rates are charged to one city than to another, and those cities are competitors in a common territory, such disparity of rates constitutes a preference in favor of the one, and a prejudice or discrimination as against the other.

But the question still remains whether the preference, or prejudice, or discrimination is *undue or unjust.*



In the above diagram, suppose A-C to represent a railroad owned by one company, and A-B to represent a railroad owned by a different company. Suppose B and C are cities which compete in the territory which lies between them. If the company owning the railroad A-C puts in a line of rates on traffic from A to C materially lower than the company owning the other railroad charges on traffic from A to B, such a disparity of rates will constitute a preference in favor of C and a prejudice or discrimination against B; because it will enable C to compete at an advantage over B in the territory which lies between them. But such preference or prejudice is not *undue* or *unjust*. Merchants at B would have no ground of complaint against the line A-C, because it carries no traffic to or from B.

4 I. C. Rep., p. 65, Eau Claire Board of Trade vs. C. M. & St. P. Ry. et al., 4th head note.

Nor would merchants at B have any complaint against the line A-B, because the reduction in rates on traffic from A to C, which alone created the disparity of rates, was not made by the line A-B, but by the line A-C, over which the line A-B has no control. Even if the same company owned both lines, the mere fact that it made a material reduction in the rates on traffic from A to C would not of itself establish the fact that the preference in favor of C was *undue*, or that the prejudice or discrimination against B was *unjust*. The competition existing at C might

compel the company to accept on traffic from A to C, rates much lower than it otherwise might reasonably charge.

XXXVIII.

The Third Section Continued.

The third section provides "that it shall be unlawful for *any common carrier* subject to the provisions of this Act *to make or give* any undue or unreasonable preference or advantage," etc.

Even though a preference be undue, or unreasonable, unless it be one which *the common carrier has "made or given," such* carrier is not responsible for it.

Such preference as may exist in these cases in favor of the longer distance points has been "made" *by competition;* and therefore it is not one which has been "made or given" *by the carriers.*

XXXIX.

The Third Section Continued.

In the Case of Texas & Pacific Ry. vs. I. C. C., 162 U. S., p. 232, this Court quotes approvingly the following statement made by Jackson, Circuit Judge, in the case of I. C. C. vs. B. & O. R. R. Co., 43 Fed. Rep., p. 53:

"The English cases establish the rule that, *in passing upon the question of undue or unreasonable preference or disadvantage*, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the Company, and

the situation and circumstances of the respective customers with reference to each other as *competitive* or otherwise."

162 U. S., p. 232, Tex. & Pac. Ry. vs. I. C. C.

In the same case, this Court in discussing the third section, says:

"In passing upon questions arising under the Act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, *and in considering whether any particular locality is subjected to an undue preference or disadvantage,* the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, *competition that affects rates should be considered,* and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not *undue and unjust,* the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered," etc.

162 U. S., pp. 233, 234, Tex. & Pac. Ry. vs. I. C. C.

175 U. S., pp. 665, Louisville, etc., R. R. Co. vs. Behlmer.

In the case of Tex. & Pac. Ry. vs. I. C. C., the "competitive" routes were either all water lines from Liverpool, via Cape Horn, to San Francisco; or water and rail lines from Liverpool, via the Isthmus of Panama, to San Francisco; or water and rail

lines from Liverpool to various Atlantic and Gulf ports in the United States, and thence to San Francisco. One of the questions argued in that case was, whether either of said "competitive routes" was "subject to the Act to Regulate Commerce;" and the Commission declined to recognize that case as deciding that competition between carriers which are "subject to the Act to Regulate Commerce" can be considered in determining whether a certain preference or advantage is undue or unjust. That question was definitely settled by this Court in the subsequent cases of the Interstate Commerce Commission vs. Alabama Midland Ry. Co., 168 U. S., pp. 164, 167; and Louisville, etc., R. R. Co. vs. Behlmer, 175 U. S., pp. 666, 667, 668.

In the case of I. C. C. vs. C. N. O. & T. P. Ry. Co. (known as the Social Circle Case), Newman, J., said:

"*As to the question of undue preference, under section 3* of the Act to Regulate Commerce, it may be stated that, unless the traffic involved here is obnoxious to the fourth clause of the Act, it can hardly be said to be an *undue* preference in favor of Augusta (the longer distance point), or an *undue* prejudice or disadvantage against Social Circle (the shorter distance point). In the Party Rate Case (Interstate Commerce Commission vs. Baltimore & Ohio R. R. Co., 145 U. S., 263, 12 Sup. Ct. Rep., 844), the Supreme Court says:

'But, so far as relates to the question of 'undue preference' it may be presumed that Congress, in adopting the language of the English Act, had in mind the constructions given to these words by the English Courts, and intended to incorporate them into the statute. . . . In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike, under the same conditions and circumstances, and that any fact which produces an inequality of condition, and a change of circumstances, justifies an inequality of charge.'

"So that unless the rates complained of, as compared with each other, violate the fourth section of the Act, there seems to be very little ground for claiming that they violate the 'undue preference' provisions of the third section."

56 Fed. Rep., 947, 948.

XL.

The Third Section Continued.

Counsel for appellant may refer to the following language used by this Court in the Alabama Midland Railway case, viz.:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the *mere* fact of competition, *no matter what its character or extent*, necessarily relieves the carrier from the restraints of the third and fourth sections," etc.

168 U. S., 167.

I do not contend "that the *mere* fact of competition no matter what its character or extent" "relieves the carrier from the restraints of the third and fourth sections." My only contention is, that "competition *that materially and substantially affects rates* should be considered." And that proposition has been distinctly decided by this Court in the case of the Texas & Pacific Ry. vs. I. C. C., 162 U. S., 233; in the case of I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., p. 166; and in the case of Louisville, etc., R. R. Co. vs. Behlmer, 175 U. S., pp. 674, 675.

Counsel for appellant may also refer to the following language used by this Court in the Alabama Midland Railway case, viz.:

"The competition may in some cases be such as, *having due regard to the interests of the public and of the carrier*, ought

justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration."

168 U. S., p. 167.

I contend that the competition at Atlanta and Opelika, (the longer distance points involved in these cases), "ought justly to have effect upon the rates," if we are to have due "regard to the interests of the public."

As said by this Court in 168 U. S., pp. 165-166; in 162 U. S., pp. 233-234; and in 175 U. S., p. 665, "the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment."

The "places of shipment" include Cincinnati and other Ohio River points; and Boston, New York, Philadelphia, Baltimore, and other eastern cities. The communities occupying the localities where the goods are delivered, include the communities at Atlanta and Opelika, as well as the communities at the shorter distance points.

The welfare of Cincinnati and other Ohio River points, and of New York and other eastern cities, and the welfare of Atlanta and Opelika are to be considered, as well as the welfare of the shorter distance points. Cincinnati and other Ohio River points, and New York and other eastern cities are entitled to the advantage which accrues to them from the competition afforded by the various competing lines which extend from those cities to Atlanta and Opelika, respectively. And Atlanta and Opelika are as much entitled to the advantage of the fact that they can avail themselves of the competition which exists between those various competing lines, as the shorter distance points are entitled to avail themselves of the advantage of the

fact that they are somewhat nearer than Atlanta and Opelika to the places of shipment.

Phipps vs. L. & N. W. Ry. Co., Law Rep. (1892), 2 Q. B., 329, et seq.

The Phipps case was cited approvingly by this Court in 162 U. S., 224, T. & P. Ry. vs. I. C. C.; and 168 U. S., p. 164, I. C. C. vs. Alabama Midland Ry. Co., et al.

I also contend that the competition at Atlanta and Opelika "ought justly to have effect upon the rates," if we are to have due "regard to the interests" of the appellee carriers.

The rates from the points of shipment to Atlanta and Opelika yield the carriers a small margin of profit over the additional cost of the movement of that traffic, and it is to the fair interests of the appellees to be allowed to earn that margin of profit, however small it may be. It is by making small "margins of profits," on large volumes of low-rate traffic, shipped between competitive points, that much of the revenue of railroad companies in this country is earned.

So long as there is any "margin of profit" at all, the appellees sustain no loss in the carriage of traffic to Atlanta and Opelika; and therefore they are under no temptation to increase the rates to the shorter distance points to recoup against loss. In other words, to paraphrase the language of this Court, "having due regard to the interests of the public, as well as of the appellee carriers, the competition at Atlanta and Opelika ought justly to have effect upon the rates;" and the Commission ought, in this case, to have allowed the appellee carriers to take that competition into consideration, notwithstanding it was competition between carriers *confessedly amenable to the Act to Regulate Commerce.*

XLI.

The Third Section Continued.

In the case of the Texas & Pacific Railway vs. Interstate Commerce Commission, 162 U. S., 219, 220, this Court says:

"The mere circumstance that there is, in a given case, a preference or an advantage, does not of itself show that such preference or advantage is *undue* or *unreasonable* within the meaning of the Act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

In the same case, on page 239, the Court says:

"*The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the Court in finding that such disparity constituted an undue discrimination*—much less did it justify the Court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm or corporation complaining that he or they had been aggrieved by such disparity."

In the case of the Savannah Bureau of Freight & Transportation vs. the Charleston & Savannah Ry. Co., 7 I. C. Rep. p. 480, the Commission having decided that certain shorter distance rates involved in that case were not a violation of the fourth section, says:

"Whether those rates are in violation of the third section, in that they give an undue preference to the more distant point, is

a different question which might arise in cases of this kind. It is incidentally raised by the allegations in this complaint, but was not relied upon on the trial. There is nothing in the case which bears upon it *except the mere fact that the rate to the intermediate point is higher.*"

I have shown in Section XXVIII. of this argument, that in the cases at bar, the Commission based the orders in controversy mainly upon the fourth section, and that all other questions that might have been raised and decided were treated by the Commission as merely subsidiary; and in that respect the cases at bar are analogous to the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., just referred to; because in the cases at bar, as in that case, there is nothing which bears upon the question of undue preference *"except the mere fact that the rate to the intermediate point is higher."*

Under the authority of the case of the Texas & Pacific Railway vs. I. C. C., as well as under the authority of the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., cited above, I contend that there is no sufficient evidence in the records in these cases to justify this Court in declaring that the mere disparity in rates between the shorter distance points and longer distance points, constitutes an undue preference in favor of the latter, or an undue prejudice against the former.

In the cases at bar, this Court is asked by counsel for the appellant to do precisely what the Commission refused to do in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., viz.: to declare that the appellees have given undue preference to the longer distance points, when there is nothing in the cases which bears upon that question, except the mere fact that the rates to the shorter dis-

tance points are higher. This Court is asked to do the very thing for which it reversed the Court of Appeals in the case of Texas & Pacific Railway vs. Interstate Commerce Commission, namely, to declare that the mere fact that the disparity between the through and the local rates is considerable, warrants the Court in finding that such disparity constitutes "an undue discrimination." It is certain that this Court has no more material evidence before it in these cases, than the Commission had before it in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., or the Court of Appeals had before it in the case of the Texas & Pacific Railway Co. vs. I. C. C., upon which to predicate a decree that the rates in controversy are violative of the third section.

XLII.

The Third Section Continued.

In the Case of I. C. C. vs. E. T., V. & G. Ry. Co., et al., Judge Severens said:

"In other words, my opinion is that the restraint of *section 4* is to be applied upon *the scale of comparison between the dissimilarity of conditions and the disparity of rates,* and that it is competent under *that* section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

85 Fed. Rep., 118.

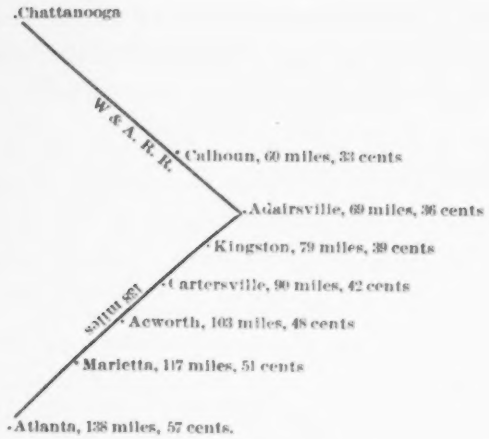
It is one thing to state a theoretical proposition and quite another thing to formulate a practical rule.

In the enforcement of the Act to Regulate Commerce, the courts will necessarily be compelled to formulate certain rules for rate-making, to be followed by the railroad traffic managers

of the country. The subject of rate-making is an eminently practical subject; and such rules as the courts may formulate must be such as can be practically applied to the commerce of the country, or they will be useless, if not injurious. With the utmost respect for Judge Severens, I submit that there is no theoretical mathematician who can understand what Judge Severens means by the phrase, "the scale of comparison between the dissimilarity of conditions and the disparity of rates;" and I also submit that there is no practical railroad traffic manager, who can make out a tariff, or schedule of rates, upon any such "scale of comparison," as Judge Severens suggests.

In the Report and Opinion, in these cases, will be found a "statement showing class rates from Chattanooga to local stations on the Western & Atlantic R. R." (Trans. No. 69, p. 23, right col.) I have shown in Section XXIII. of this argument that those local rates are from 10 to 50 per cent. less than the local rates charged by any other railroad in Georgia, except the Rome Railroad, and the Georgia Railroad. As the railroad rates in Georgia are fixed by a Commission of that State, it is fair to presume that they are reasonably low; and as the local rates of the Western & Atlantic Railroad are from 10 to 50 per cent. lower, as a general rule, than the local rates of, practically, all the other railroads in the State, it is fair to presume that they are not only reasonably low, but very low.

The local rates of the Western & Atlantic Railroad, as will be seen by reference to said Report and Opinion, (Trans. No. 69, p. 23, right col.) increase as the distance increases from Chattanooga to Atlanta; and the following diagram has been drawn to a scale showing the distance from Chattanooga to each of the stations in controversy in Case No. 69, and the rate on first class freight, in cents per one hundred pounds, from Chattanooga to each of said stations, as set forth in said statement.


Chattanooga
W. & A. R. R.
Calhoun, 60 miles, 33 cents
Adairsville, 69 miles, 36 cents
Kingston, 79 miles, 39 cents
Cartersville, 90 miles, 42 cents
Acworth, 103 miles, 48 cents
Marietta, 117 miles, 51 cents
Atlanta, 138 miles, 57 cents.

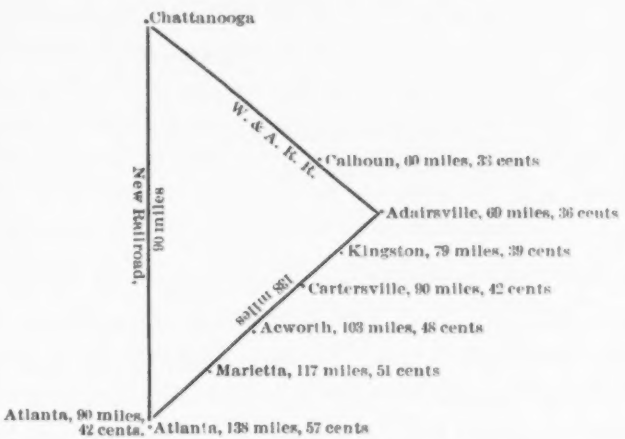
As counsel for the appellant contends that distance should be a controlling factor in the construction of rates, and as the local rates of the Western & Atlantic R. R. are constructed upon the basis of distance, it would seem that they ought to meet with his approval.

It will be seen from said diagram that the distance from Chattanooga to Atlanta, via the Western & Atlantic R. R., is 138 miles; and for that distance the Western & Atlantic R. R. is allowed to charge 57 cents per 100 pounds on first class freight.

It will also be seen that the distance from Chattanooga to Cartersville is 90 miles; and for that distance the Western & Atlantic R. R. is allowed to charge 42 cents per 100 pounds on first class freight.

For many years the Western & Atlantic R. R. was the only rail line from Chattanooga to Atlanta. And as the rates from Chattanooga to all of said local stations were constructed upon a mileage basis, and as there was no instance where a greater charge was made for a shorter than for a longer distance, on traffic originating at Chattanooga, people living along the line of the Western & Atlantic R. R. were doubtless entirely satisfied with the rate adjustment on that traffic.

Suppose a new railroad were constructed from Chattanooga to Atlanta, over a line that is only 90 miles long, as shown in the following diagram:


Chattanooga
W. & A. R. R.
Calhoun, 60 miles, 33 cents
New Railroad, 90 miles
Adairsville, 60 miles, 36 cents
Kingston, 79 miles, 39 cents
138 miles
Cartersville, 90 miles, 42 cents
Acworth, 103 miles, 48 cents
Marietta, 117 miles, 51 cents
Atlanta, 90 miles, 42 cents.
Atlanta, 138 miles, 57 cents

Suppose that the local rates of the new road were fixed by the Georgia Railroad Commission, and fixed on the same basis as that upon which the local rates of the W. &. A. R. R. are fixed.

As the distance from Chattanooga to Atlanta by the new road would be only 90 miles, the new road would be limited to a maximum rate of 42 cents per 100 pounds from Chattanooga to Atlanta. In other words, the effect of the construction of the new road would be, for all practical purposes, to reduce the rail distance from Chattanooga to Atlanta from 138 miles to 90 miles; and to entitle Atlanta, upon a distance basis, to the same rates from Chattanooga, via the new road, as Cartersville is entitled to via the W. & A. R. R.

Cartersville would have no right to complain; because, though she would be nearer than Atlanta, to Chattanooga, measured by the W. & A. R. R., Atlanta, measured by the new line, would be as near as Cartersville, to Chattanooga.

Acworth and Marietta would have no right to complain; because, measured by the new road, Atlanta would be nearer than they, to Chattanooga.

The practical question arises, how ought the traffic manager of the W. & A. R. R. to readjust his rates from Chattanooga to Acworth and Marietta? Imagine him attempting to put into practical operation Judge Severens' "scale of comparison between the dissimilarity of conditions and the disparity of rates."

The new road would not be allowed by the Georgia Railroad Commission to charge more than 42 cents per 100 pounds on first class freight from Chattanooga to Atlanta; and the traffic manager of the W. & A. R. R. would be forced to reduce the first class rate of his road from Chattanooga to Atlanta from 57 cents, to 42 cents, per 100 pounds; or he would have to abandon all of the Atlanta traffic to the new road. No one would pay the W. & A. R. R. 57 cents per 100 pounds for transporting freight from Chattanooga to Atlanta; when, for 42 cents, its transportation could be obtained over a new and shorter route, and in less time.

If the traffic manager of the W. & A. R. R. should conclude to abandon the Atlanta traffic, the result would be that both Atlanta and Chattanooga would be deprived of the competitive services of the W. & A. R. R.; and the W. & A. R. R., which had, for many years, performed all of the service between Chattanooga and Atlanta, would be prevented from performing any of it in the future. It would lose all the revenue which it had formerly realized from that traffic. The loss of revenue thus occasioned would have to be made up by increasing the rates to and from the local stations on the W. & A. R. R. between Chattanooga and Atlanta, provided that competition between product and product or between market and market would permit it, and the Georgia Railroad Commission would permit those rates to be increased. And if those rates could not be increased, the W. & A. R. R., or its stockholders and creditors, would have to sustain

the entire loss of revenue; except in so far as by reducing the number of trains, and otherwise cheapening its transportation service, the W. & A. R. R. could economize in its expenditures.

If we suppose that the traffic manager of the W. & A. R. R. ascertained that he could earn sufficient revenue, at the reduced rate from Chattanooga to Atlanta, to pay something more than the additional cost of movement of the Atlanta traffic, he would naturally determine to continue to carry freight from Chattanooga to Atlanta. It would still be necessary for his trains to run from Chattanooga in the direction of Atlanta, in order to carry freight from Chattanooga to the local stations on the W. & A. R. R.; and the additional cost of carrying, in the same trains, a few cars of freight loaded at Chattanooga, and destined to Atlanta, would be comparatively small. If he could earn anything over such additional cost of movement, while it might not be sufficient to pay anything toward dividends, or even toward fixed charges, it would still be a profit *over what it would cost to move that particular freight;* and however small it might be, it would contribute something toward the operating expenses. At all events, it would not be any burden upon the other traffic.

We will suppose, therefore, that the traffic manager of the W. & A. R. R. did conclude to continue carrying freight from Chattanooga to Atlanta; and that he was forced to accept 42 cents per 100 pounds on first class freight from Chattanooga to Atlanta. Such action would amount to a reduction of 17 cents per 100 pounds on that class of freight, from Chattanooga to Atlanta. Does Judge Severens mean that the rates from Chattanooga to Acworth and Marietta should be reduced *in the same proportion* as the rates from Chattanooga to Atlanta were reduced; or does he mean that the rates from Chattanooga to Acworth and Marietta should be reduced without regard to proportion, until they be no higher than the new rates from Chattanooga to Atlanta? If he does not mean either of these things, what does he mean? The traffic manager of the Western &

Atlantic R. R., in order to obey the decree of the Court, must have some *practical* rule upon which to reconstruct his schedule.

If it be said that the rates from Chattanooga to Acworth and Marietta should be reduced in the same proportion as the rates from Chattanooga to Atlanta are reduced, such reduction would not accord with the "scale of comparison between the dissimilarity of conditions and the disparity of rates." There would be no competitive circumstances or conditions whatever at Acworth or Marietta; while the competitive circumstances and conditions at Atlanta (caused by the construction of the new road) would be the sole cause of the reduction in rates from Chattanooga to that point.

If it be said that the rates from Chattanooga to Acworth and Marietta should be reduced, without regard to proportion, until they be no higher than the rates from Chattanooga to Atlanta by the new road, such a reduction would give to Acworth and Marietta an undue preference over Atlanta, provided distance be the controlling factor in rate construction; because, while, by the new road, the distance from Chattanooga to Atlanta would be only 90 miles, the distance from Chattanooga by the Western & Atlantic R. R. to Acworth is 103 miles, and to Marietta 117 miles.

If it be said that, though it might not be necessary to reduce the Acworth and Marietta rates in the same proportion as the Atlanta rates were reduced, and though it might not be necessary to make the Acworth and Marietta rates as low as the Atlanta rates, still there ought to be "some" reduction in the Acworth and Marietta rates, the practical question remains, *how much reduction shall be made?*

As the new road would not touch either Acworth or Marietta, its construction would not affect the circumstances and conditions existing at either of those points, and, therefore, I do not

see why either of them should be entitled to any reduction in rates, merely because there had been a change of circumstances and conditions at Atlanta. But conceding, for the sake of argument only, that Acworth and Marietta would be entitled to "*some*" reduction, the question remains as to what practical rule or principle should govern the traffic manager of the W. & A. R. R. in making up his schedule or tariff to put the reduction into effect? Again, this is but asking, in another form, what does Judge Severens mean by the phrase, the "scale of comparison between the dissimilarity of conditions and the disparity of rates?"

I repeat that there is no theoretical mathematician, or practical traffic manager, who can take the diagram referred to above, *and mark opposite each of the local stations on the W. & A. R. R. between Cartersville and Atlanta the rate that ought to be fixed from Chattanooga to that station, so that the rates will comply with Judge Severens' "scale of comparison between the dissimilarity of conditions and the disparity of rates."*

If Chattanooga were in Georgia, so that Chattanooga and Atlanta would both be subject to the jurisdiction of the Georgia Railroad Commission, Rule No. 6 of that Commission would permit the Western & Atlantic Railroad to continue to give Chattanooga and Atlanta the benefit of its competition; and would permit it to reduce its rates between those two points so as to meet the rates of the new line, "without making a corresponding reduction at all stations" along the line of its road.

Trans. No. 69, p. 37, left col.

In other words, the Georgia Railroad Commission recognizes the fact that a railroad in order to compete must accept the lowest rates offered by any of its competitors; and that it is unjust to require it to reduce all of its intermediate local rates as the condition upon which it shall be allowed to compete at the competitive point.

The Interstate Commerce Commission takes the opposite view from that taken by the Georgia Railroad Commission; and as the roads represented in said diagram are interstate roads, the Interstate Commerce Commission, prior to the Alabama Midland Railway decision, would have reduced all of the rates from Chattanooga to the local stations between Cartersville and Atlanta down to the level of the Atlanta rate. In that case there would have been no "*disparity* of rates," and consequently no use for a "scale of comparison between the dissimilarity of conditions and the disparity of rates." But since the decision in the Alabama Midland Railway case, the competition at Atlanta would be recognized as constituting a substantial "dissimilarity of conditions;" and a "disparity of rates" would exist, to the extent of the difference between the new rate from Chattanooga to Atlanta, and the old rates from Chattanooga to the respective local stations on the W. & A. R. R. between Cartersville and Atlanta; and if Judge Severens' "scale of comparison" is of any value, *it ought to enable us to determine the precise amount of reduction that ought to be made in the rate to each of those stations.*

In the diagram submitted above in this section, I have supposed that the new railroad constructed from Chattanooga to Atlanta is only 90 miles long, while the Western & Atlantic Railroad is 138 miles long.

It will be seen, however, that the principle is precisely the same, if we suppose the new railroad to be longer than the Western & Atlantic Railroad.

As a matter of fact, the E. T. V. & G. Ry. Co. has in recent years constructed a line from Chattanooga to Atlanta which is 154 miles long.

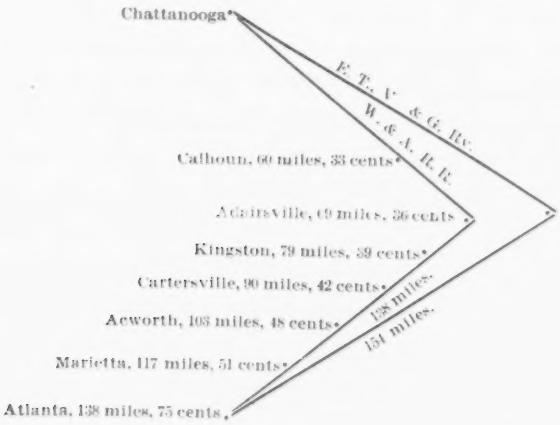
See Travelers' Official Guide, June, 1899, p. 788.

Said line is now a part of the Southern Railway System. As said E. T. V. & G. Ry. labors under the disadvantage of

being a new road, and the longest line, it is natural that it should offer some inducement to attract a portion of the competitive traffic to its own rails.

Suppose said E. T. V. & G. Ry. had seen proper to put in a rate of 42 cents, from Chattanooga to Atlanta. It is manifest that the Western & Atlantic Railroad would be compelled to meet that rate, or abandon the competitive traffic at Atlanta.

The following diagram shows the Western & Atlantic Railroad, as shown in the first diagram in this section, and also the line of the East Tennessee, Virginia & Georgia Railway, now a part of the Southern Railway system:


Chattanooga
E. T. V. & G. Ry.
W. & A. R. R.
Calhoun, 60 miles, 33 cents
Adairsville, 69 miles, 36 cents
Kingston, 79 miles, 39 cents
Cartersville, 90 miles, 42 cents
Acworth, 103 miles, 48 cents
Marietta, 117 miles, 51 cents
Atlanta, 138 miles, 75 cents
138 miles
151 miles

XLIII.

The Third Section Continued.

Counsel for the appellant contended in the court below:

That in determining the extent to which a carrier may go in protecting its own interests, we should apply the maxim of the law, "'So use your own that you do not injure the interest of another;' and that under said maxim, discrimination is only

justified to the extent that it may be practiced without inflicting material injury on any *legitimate* interest of the public, or any portion of the public."

The maxim quoted by counsel is conceded, when properly understood.

I concede that competition is no justification for a lesser charge for a longer haul, unless the competition at the longer distance points be such as subserves the public interest.

But in this case, the public consists of three classes of persons:

First: The public at Cincinnati, Boston, New York, Philadelphia and Baltimore.

Second: The public at Atlanta and Opelika.

Third: The public at the shorter distance points.

That the public at the shorter distance points is discriminated against is admitted; but my contention is that the discrimination is not unlawful, because it is not *unjust*.

The public at the shorter distance points may be injured (though not in a legal sense) in not being able to compete on equal terms with Atlanta or Opelika in common territory. But the public at Cincinnati, Boston, New York, Philadelphia and Baltimore, as well as the public at Atlanta and Opelika, are greatly benefited by the competition which exists at Atlanta and Opelika.

The Court must look to the interests *of the great majority of the public;* and if it conflicts with the interest of a small minority, the loss to the latter is, in contemplation of law, *damnum absque injuria.*

Neither an individual, nor any "portion of the public" has any "*legitimate* interest" in a question *of public policy*, which can be allowed to prevail against the interest of the majority.

A single individual, or any " portion of the public," is entitled to be protected in life, liberty, and property, against the majority, however large the majority may be. But when it comes to a mere question *of public policy*, the universal rule is, ***Salus populi suprema lex.***

The question in this case is merely one *of public policy*. The Court will place in one scale the public at Cincinnati, Boston, New York, Philadelphia, and Baltimore, together with the public at Atlanta and Opelika; while in the other scale it will place the public at the shorter distance points; and the legitimate interests of the public, as a whole, will be found in that scale which may preponderate.

Suppose the appellees should to-morrow withdraw from competition at Atlanta and Opelika. It is obvious that such withdrawal would operate to the injury of the public at Atlanta and Opelika, and also to the injury of the public at Cincinnati, Boston, New York, Philadelphia and Baltimore, who are engaged in the sale and shipment of goods to Atlanta and Opelika. But such withdrawal would not reduce the shorter distance rates in the least.

In a word, the public at the shorter distance points would not be benefited; while the public at Cincinnati, Boston, New York, Philadelphia and Baltimore, as well as the public at Atlanta, and Opelika, would be injured.

As a matter of fact, even the public at the shorter distance points is interested in preserving the competition which exists at Atlanta, and Opelika; because changes in rate conditions at Atlanta or Opelika work similar changes in rates to the shorter distance points. Thus a first-class rate of $1.54 on traffic from New York to La Grange, made by adding the $1.14 rate from New York to Atlanta, to the 40 cent local from Atlanta to La Grange, would be reduced to 80 cents, if, during a rate war, the first-class rate from New York to Atlanta should be as low as 40 cents.

XLIV.

The Third Section Continued.

Counsel for the appellant contended, in the Court below, that according to my argument, carriers, in exercising the privilege of taking competition into consideration, may act without limit.

On the contrary, I concede that carriers, in exercising the privilege of taking into consideration competition as one of the circumstances and conditions affecting transportation, must act within "reasonable limits."

In the cases at bar I suggest that the "reasonable limits" imposed upon the exercise of said privilege are four; and all of them are eminently practical.

First: The rates charged by the appellees to the shorter distance points must not be unjust or unreasonable, within the purview of the first section of the Act.

Second: The acceptance of lower rates to Atlanta and Opelika must not create an *undue* prejudice against the shorter distance points; though in determining whether the prejudice is *undue,* regard must be had to the question whether the competition at Atlanta and Opelika is such as to create a substantial dissimilarity of condition.

Third: The competition at Atlanta and Opelika must be such as subserves the public interest. It must also be real, material and substantial; and such as to compel the acceptance by the appellees of the rates that are accepted by them at those points.

175 U. S., 674, 675, Louisville, etc., R. R. Co. vs. Behlmer.

Fourth: The rates accepted by the appellees on traffic to Atlanta and Opelika, must yield some profit (though it may be very small) *over the additional cost of the movement of that traffic.*

Within the above limits, any rates which may be accepted by the appellees upon traffic to Atlanta and Opelika are lawful.

The first limitation suggested by me concedes that the rates charged by the appellees to the shorter distance points must not be unjust or unreasonable (175 U. S., p. 674); i. e., that they must be such rates as would be regarded as perfectly fair, were it not for the fact that the appellees are charging less rates to Atlanta and Opelika.

If the rates charged by the appellees to the shorter distance points are not just and reasonable they violate the first section of the Act; they must be condemned under that section; and there is no need to invoke the operation of either of the subsequent sections.

But if the rates charged by the appellees to the shorter distance points are just and reasonable (a question which I will consider hereinafter under the first section of the Act), we have the case of complaints made on behalf of certain persons at the shorter distance points who are charged rates which are perfectly just and reasonable; and whose only real objection is that the appellees are charging less rates to Atlanta and Opelika, the longer distance points.

As said by Lord Curriehill, in Hozier vs. the Caledonian Ry. Co., their complaint "may be likened to that of the laborer, who, having worked all day, complained that others, who had worked much less, received a penny like himself."

> 1 Nev. & Mac., p. 32, Note 4; 1 Nev. & Mac., pp. 45-47, Jones vs. E. C. Ry. Co.; 2 Nev. & Mac., p. 202, Foreman, et al. vs. Great Eastern Ry. Co.; 1 Nev. & Mac., pp. 97-108, Harris vs. Cockermouth, etc., Ry.; 1 Nev. & Mac., p. 120, Ransome vs. E. C. Ry. Co.

The Hozier case was cited by this Court in 145 U. S., p. 282, and in 162 U. S., p. 222.

The Jones case was cited by this Court in 145 U. S., p. 283.

The Foreman case was cited by this Court in 162 U. S., p. 222.

And the Harris case was cited by this Court in 162 U. S., pp. 223, 224.

If the rates to the shorter distance points are just and reasonable (a question which I will hereinafter consider under the first section), the appellees ought not to be required to reduce them; even though such reductions may be necessary to place the shorter distance points upon a "rate equality" with Atlanta and Opelika, the longer distance points; because such a reduction in rates to the shorter distance points involves a serious reduction in the revenue which the appellees derive from the present rates to those points.

The second limitation suggested by me concedes that the prejudice against the shorter distance points must not be *undue;* though I contend that it is *not undue*, because the competition at Atlanta and Opelika is such as "to create a substantial dissimilarity of condition."

175 U. S., p. 674.

The third limitation suggested by me concedes that the competition at Atlanta and Opelika, the longer distance points, must be such as subserves the public interests; that it must be real and not artificial or merely conjectural; and that it must be material and substantial, i. e., such as to compel the acceptance of the rates that are charged by the appellees to those points.

175 U. S., p. 675.

The fourth limitation suggested by me concedes that the rates accepted by the appellees on traffic to Atlanta and Opelika, the longer distance points, must yield some profit (though it may be very small) *over the additional cost of the movement of that traffic.*

If the competition at Atlanta and Opelika, the longer distance points, be real, and such as to affect rates, the carriers must accept those rates or abandon the competitive traffic; but if the rates be so low as not to pay the additional cost of the movement of the competitive traffic, the carriers ought not to be allowed to compete for it. It would not be to their interest to carry the traffic at a loss; and it would not be to the interest of the public for them to do so; because no one is ever benefited in the long run by having another work for him at a loss.

But if the competition be real, and such as to affect rates, and if those rates pay something more than the additional cost of the movement of the traffic, it is to the interest of the carriers, as well as to the interest of the public, that the carriers should be allowed to compete for the traffic. Whatever profit there may be in the traffic, increases, to that extent, the revenues of the carriers; and if there be a profit (however small), there is of course, no "loss" to be reimbursed by attempting to increase the local rates. On the contrary, the local stations are benefited by allowing the carriers to participate in the competitive traffic; because whatever profit may be realized from that traffic, (however small it may be,) has a tendency to reduce the local rates and to improve the local service.

All four of the limitations suggested by me are entirely practical.

Though the question of the reasonableness of the rates to the shorter distance points involves (as is hereinafter shown) a very difficult problem; it is one which, upon proper evidence, is capable of judicial determination; and there are many cases in the Federal Jurisprudence, in which such questions have been determined by the courts.

It is also entirely practicable to determine whether the competition at Atlanta and Opelika "creates a substantial dissimi-

larity of condition;" and the determination of that question will determine whether the prejudice against the shorter distance points is, or is not, *undue*.

It is also entirely practicable to determine whether the competition at Atlanta and Opelika, the longer distance points, subserves the public interest; whether it is real or artificial; and whether it is material, and substantial, and such as to affect rates.

It is also entirely practicable to ascertain whether the rates accepted by the appellees on traffic to Atlanta and Opelika, the longer distance points, yield a profit over the additional cost of the movement of that traffic. For while it is impossible to ascertain the cost of carrying any particular ton of freight, or any particular class of freight, it is entirely practicable to closely approximate how much the expenses of a company will be increased by moving a certain traffic, over and above what they would be, if that particular traffic were declined; and such increase represents what is called *the additional cost of movement.*

I submit that the practical limitations, which I have suggested, are far preferable to the theoretical "scale of comparison between the dissimilarity of conditions and the disparity of rates" suggested by Judge Severens; and that the limitations suggested by me have been, in effect, approved by this Court in Louisville, etc., R. R. Co. vs. Behlmer, 175 U. S., pp. 674, 675.

In the cases at bar, the Court of Appeals said:

"As the non-competitive point thus gets the benefit of the lowest rate to any of the neighboring competitive points; and as the carriage of competitive traffic to the respective points is remunerating to the carriers to an extent that more than pays the expense of moving the competitive traffic, it is difficult to perceive how the non-competitive points are subject to any undue

or unreasonable prejudice or disadvantage by this scheme of rate-making."

93 Fed. Rep., p. 92, I. C. C. vs. W. & A. R. R. Co., et al.

XLV.

The Third Section Continued.

Counsel for the appellant contends that while some difference between the rates to the shorter distance points and the rates to Atlanta and Opelika, the longer distance points, may be justifiable, the present differences are too great. He does not suggest what the differences ought to be, other than that the rates to the shorter distance points ought not to be higher than the rates to the longer distance points.

Under the orders made by the Commission in these cases the appellees are enjoined from charging any greater compensation to the shorter distance points than to the longer distance points; but they are not enjoined from charging as great compensation to the former as to the latter. Such orders are intelligible under the *fourth* section; but they are wholly unintelligible under the *third* section.

If it constitutes undue preference in favor of the longer distance points, to charge less to them than to the shorter distance points, it constitutes unjust prejudice against the shorter distance points, to charge as much to them as to the longer distance points. If distance is to be the controlling factor in determining whether undue preference or undue prejudice exists in a given case, *all rates must be constructed upon a mileage basis;* and instead of permitting the appellees to charge as much to the shorter distance points, as to the longer distance points, the Commission should have ordered the appellees to charge less to the shorter distance points; and to so reduce their rates to the

shorter distance points as to make them the same per ton per mile as those charged to the longer distance points. In a word, the Commission (if it have any power to prescribe future rates), should have ordered the appellees *to construct their tariffs on a mileage basis.*

In the cases at bar, the Court of Appeals said:

"If the mere charging of a greater rate for the shorter than for the longer haul gives an undue and unjust preference to the longer distance points, and subjects the shorter distance points to any undue prejudice or disadvantage, it is difficult to see how the charging exactly the same rate for the shorter haul, that is charged for the longer, shall escape condemnation."

93 Fed. Rep., p. 91, I. C. C. vs. W. & A. R. R. Co., et al.

If charging the same rate for the shorter haul, that is charged for the longer haul, subjects the shorter distance points to undue prejudice or disadvantage, it is evident that the only way in which the undue prejudice or disadvantage can be removed, is to construct the rates to the shorter distance points, as well as to the longer distance points, according to mileage.

The theory of equal mileage rates is entirely correct in all cases *where competition does not interfere with it.* But in cases where competition does interfere, the theory of equal mileage rates cannot be adopted in actual practice; and though it has been proposed in every country, it has been abandoned by all.

In the report of the case of Ransome vs. E. C. Ry., on page 71 of 1 Nev. & Mac., in Note 6, there is an abstract from the report of the English Parliamentary Committee upon the amalgamation of railways in 1872, in which they declare equal mileage rates to be impracticable.

"First, because *it would prevent railway companies from lowering their rates so as to compete with traffic by sea, by canal,*

or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition, and the company of a legitimate source of profit."

Second, "it would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual, goods brought in large and constant quantities, *or from carrying for long distances at a lower rate than for short distances."*

The report continues: "In short, to impose equal mileage rates on the company *would be to deprive the public of the benefit of much of the competition* which now exists, or has existed; to raise the charges on the public in many cases where the companies now find it to their interest to lower them; and *to perpetuate monopolies,* in carriages, trade and manufacture, *in favor of those routes and places which are nearest* and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, *not that the rates they themselves pay are too high, but that the rates which others pay are too low."*

In March, 1885, the Senate appointed a select committee on Interstate Commerce. The committee took a mass of testimony, filling a volume of 1,450 pages; and made a report which, with its appendix, fills over 200 pages, and in its report is embodied the report of the English Parliamentary Committee, quoted above.

See Report of Senate Select Committee on Interstate Commerce, Jan., 1886, p. 57.

In the case of I. C. C. vs. Alabama Midland Ry. Co., Judge Bruce said: "In the case at bar there are questions of competing lines; and the proposition of the complainant is that, notwithstanding this, the circumstances and conditions are substantially

the same, and that it is in violation of the fourth section of the statute to charge more for the short haul to Troy, the shorter distance, than to Montgomery, the longer distance point. This argument proceeds upon the view that distance is the controlling factor on a question of rate for transportation of property; and yet *these other matters may be, and often are, more controlling than even distance itself.*"

69 Fed. Rep., p. 231, I. C. C. vs. Alabama Midland Ry. Co.

In the cases at bar, the Commission said: "To charge less per mile for greater distances is a common rule of transportation and its legality is well settled."

Trans. No. 69, p. 41, left col.

In the case of Imperial Coal Co. vs. Pittsburg & L. E. R. Co., it was held by the Commission that "in determining the question of undue prejudice from a rate, distance is only one of the factors, and other material facts, such as character and quality of the commodity, cost of production, *extent and nature of the competition in the business itself and by other transportation lines*, and the interest of the public in the use of the commodity and its market cost, are to be considered."

2 I. C. Rep., p. 436, Imperial Coal Co. vs. Pittsburg & L. E. R. Co. 3d head note.

In the case of Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., decided December 31st, 1897, the Commission said: "Upon the other hand, *it often happens that distance is altogether disregarded*, and it has been held that this may be proper within certain limits and under certain conditions."

7 I. C. Rep., p. 474, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co.

In the cases at bar, the Court is asked to hold that the mere

fact that a greater rate is charged for a shorter than for a longer distance, constitutes an undue preference of the longer distance point over the shorter distance point. The charge of undue preference *is based upon distance alone*, and it must be sustained if at all, upon the theory that distance must control in rate-making, to the disregard of all other circumstances and conditions.

XLVI.

The Third Section Continued.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says: "Now I think that no one can read these schedules fixing the rates of through traffic from the seaboard to Chattanooga (the shorter distance point in that case), and to Nashville and Memphis (the longer distance points) through Chattanooga, without being instantly and strongly impressed that there is something wrong in the principle on which such rates are adjusted, and that the *equality* which the Commerce Act was enacted to secure has been utterly disregarded."

85 Fed. Rep., p. 110.

Again he says: "If for such causes as existed here such *unequal* charges can be made along the same line of traffic, the inevitable result must be that the Commerce Act will prove of no value, and the leading principle of the common law relating to the same general subject will be overthrown."

85 Fed. Rep., p. 113.

Neither the common law nor "the Commerce Act" requires "equality" of charge, *except where the services are similar.*

In the case of I. C. C. vs. B. & O. R. R., 145 U. S., 275, Mr. Justice Brown, speaking for this Court, says: "Prior to the enactment of the Act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24

Stat. 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; (citing cases) though the weight of authority in this country was in favor of an *equality of charge* to all persons *for similar services.*"

It has been held by this Court in the "Import Case," as well as in the "Alabama Midland Ry. Case," that the service rendered by a carrier in the transportation of traffic to a competitive point is not "similar" to the service rendered in the transportation of traffic to a non-competitive point; and therefore a person shipping to a non-competitive point is not entitled to an "equality" of charge with one shipping to a competitive point.

In ex parte Koehler, 31 Fed. Rep., p. 321, Judge Deady said: "The places between which competition in transportation exists between water craft and railways, *or even the latter,* always will and must send and receive freight at lower rates than others not so favored. This is the result of natural advantage, supplemented often by exceptional sagacity and enterprise, and it would be folly in the Legislature to prevent it if it could. As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give each one an even chance and a fair show to make the most of his or its opportunities, and leave the result to circumstances over which it has little, if any, direct control."

In the case of Brewer & Hanleiter vs. Central of Georgia Railway Co., 84 Fed. Rep., p. 268, Judge Speer said: "Shall government undertake the impossible but injurious task of making the commercial advantages of one place equal to those

of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce. The Act to Regulate Interstate Commerce has no such purpose, and yet this appears to be the inevitable result of the decree the complainants seek in the case, without any adequate corresponding advantage either to themselves or to the community in which they live."

If the law be that all persons are entitled to an "equality" of charge, there would be no use for the first section of the Act which requires that rates be reasonable; nor for the second section of the Act which prohibits unjust discrimination; nor for the third section of the Act which prohibits undue preference; nor for the fourth section of the Act which prohibits a greater charge for a shorter distance than for a longer distance, etc. If the law be that all rates shall be equal; or that all rates shall be equal in proportion to mileage; the first four sections of the Act are wholly unnecessary.

XLVII.

The Third Section Continued.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says:

"If the fact of such competition is allowed to become a *dominating* factor in fixing the relative charges of transportation to the different places along the lines, those communities where there is no competition must be blighted by the disadvantage with which they are burdened, and the favored places grow prosperous in the sacrifice of others." . . . "With this as the

rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever. At least this would seem to be the very probable tendency."

85 Fed. Rep., p. 113.

If the fact of competition is *not* to be allowed to operate as a *dominating* factor in fixing the relative charges for transportation, then it must be prohibited or stifled altogether. Because, if competition be allowed to operate at all, it *necessarily* becomes a *dominating* factor in fixing the relative charges for transportation to the different places along the line of a railroad.

As said by Judge Deady:

" The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will, and must, send and receive freight at lower rates than others not so favored."

31 Fed. Rep., p. 321, Ex Parte Koehler.

We are therefore confronted with the question as to whether it was the intention of Congress, in passing the Act to Regulate Commerce, to prohibit or stifle competition.

The fifth section of the Act which prohibits pooling, is alone sufficient to show that Congress had no such intention. It expressly prohibits every contract, agreement or combination for pooling; and pooling was prohibited because it was supposed to have a tendency to stifle competition.

In the case of I. C. C. vs. B. & O. R. R. Co., Mr. Justice Brown, speaking for this Court, said:

" It was not the design of the Act to stifle competition."

145 U. S., p. 281, I. C. C. vs. B. & O. R. R. Co.

If it was not the design of the Act to stifle competition, and if the necessary effect of competition is to enable those places between which competition exists to send and receive freight at

lower rates than others not so favored, are the competing lines to be censured for the disadvantage under which those places labor at which no competition exists?

XLVIII.

The Third Section Continued.

Judge Severens speaks of the shorter distance points as being "*blighted* by the disadvantage with which they are burdened." Now, if it be conceded for the sake of argument that he is correct in describing them as "blighted," are the competing lines censurable for the "blighted" condition of those places?

The question is well answered by Judge Deady, as follows:

"It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly, for the purpose of putting the one place up, or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the Legislature declared to be a reasonable rate, or abandon the field and let its road go to rust."

23 Fed. Rep., 533, Ex Parte Koehler.

In another case Judge Deady said:

"Freight carried to or from a competitive point, is always carried under substantially *dis*similar circumstances and conditions from that carried to or from non-competitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than for a short one. When each haul is made from, or to, a

non-competitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is wilfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case, the circumstances are altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or abandon the field, and let its road go to rust."

31 Fed. Rep., 319, Ex Parte Koehler.

In the cases at bar, it is not the fault or contrivance of the appellees that compels the discrimination in favor of Atlanta and Opelika; but it is the necessary result of circumstances altogether beyond their control. It is not done wantonly, for the purpose of putting those places up, or of putting the shorter distance points down; but only to maintain appellees' business against rival and competing lines of transportation. In other words, the matter, so far as appellees are concerned, resolves itself into a choice of evils. Appellees must either compete with the other railroads which run to Atlanta and Opelika, or abandon the Atlanta and Opelika traffic altogether. The power of appellees to make rates to Atlanta and Opelika is limited by the necessities of the situation. Competition controls the charge at Atlanta and Opelika. The appellees must take what they can get, or abandon the field at Atlanta and Opelika.

The rates from Atlanta and Opelika to the shorter distance points are fixed by the Georgia Railroad Commission, and cannot be exceeded; and appellees' through rates to the shorter distance points cannot exceed the competitive rates to Atlanta or Opelika, added to the rates fixed by the Georgia Railroad Commission from Atlanta or Opelika to said shorter distance points, respectively. *The result is that the through rates to said shorter distance points, are as completely controlled by the competition at Atlanta or Opelika, as are the Atlanta or Opelika rates themselves.*

XLIX.

The Third Section Continued.

Judge Severens speaks of the longer distance points as "favored places" and says that they "grow prosperous in the sacrifice of others." In what sense are Atlanta and Opelika, the longer distance points "favored?" Are they "favored" in any other sense than that the rival lines centering at those points compete with each other, as the Interstate Commerce Act allows them to do? If those lines should enter into any contract, agreement, or combination to pool their freights at such points, and in that way (as is supposed) to stifle competition, they would commit an offense against the fifth section of that Act. If they should enter into any "trust" arrangement to control the rates at such points, they would render themselves amenable to the Anti-Trust Law.

166 U. S., p. 290, U. S. vs. Frt. Assn.

The appellees are therefore placed in this dilemma. If they enter into any contract, agreement or combination to stifle competition at the longer distance points, they violate one, and perhaps two acts of Congress. If they compete with each other, in good faith, at those points, inasmuch as the necessary result of such competition (as said by Judge Deady) is to reduce the rates at those points, then, according to Judge Severens, they are guilty of "favoring" those points; which is but another way of saying that they give to those points an *undue* and *unjust* preference. It would seem, therefore, "that they are to be damned if they do, and to be damned if they don't."

If it be said that Atlanta is "favored" over the shorter distance points on the W. & A. R. R., and the Georgia R. R., in the sense that Atlanta is geographically so located as to have become the point of intersection of numerous rival lines of railway, and the strategetical rate-making center of the southeastern section of

the United States, the fact is admitted; but it furnishes no just ground of complaint either against Atlanta, or against the railway lines which center there.

As said by Judge Deady, "It is not the fault of the railways that the shipper, who does business at a competing point, has the advantage of it."

23 Fed. Rep., 533, Ex Parte Koehler.

Neither is it the fault of Atlanta or of the merchants who are located there that they have the benefit of the competition which exists there. As said by the English Court of Appeals: "I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competing routes, is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market."

"Why the logical situation, in regard to its proximity to the market, is to be the only consideration to be taken into account, in dealing with the question, as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, *the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of advantage which he derives from that favorable position of his works.*"

Law Rep. (1892), 2 Q. B., p. 242, Executors of Phipps vs. L. & N. W. Ry. Co.

When Judge Severens speaks of the shorter distance points being "blighted by the disadvantage with which they are burdened," it becomes important to ascertain by what disadvantage they are burdened; and by whom that burden is imposed. Are those places burdened by any disadvantage except that no com-

peting lines of transportation center there? And is that a disadvantage occasioned by the action of the appellees, or is it a disadvantage which arises solely from the geographical location of those places?

When Judge Severens speaks of the longer distance points growing "prosperous in the sacrifice of others," in what sense does he use the word "sacrifice?" Can any one show, or will any one undertake to assert, that prior to the promulgation of the rates which competition has forced the carriers to accept upon Atlanta traffic, the local stations on the W. & A. R. R., or on the Georgia R. R., enjoyed lower rates than they now enjoy? On the contrary, is it not a notorious fact that the rates to those local stations were very much higher then than they are now; and is it not manifest that at all those stations where the rates base upon Atlanta, every reduction which competition has heretofore forced in the Atlanta rates has inured to the full extent of such reduction to the benefit of those local stations? And if that be true, how can it be said that Atlanta has grown prosperous "in the sacrifice of those stations?" On the contrary, those stations have been benefited by every reduction in Atlanta rates; and Atlanta, instead of becoming prosperous *"in the sacrifice" of those stations,* has shared her prosperity with them.

L.

The Third Section Continued.

Judge Severens, speaking of the rule of charging more for a shorter than a longer distance, where competition compels the lower charge to the longer distance point, says:

"With this as the rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever."

It is true that the density of population and of traffic is much

greater in the States north of the Ohio and east of the Mississippi Rivers than it is in the States south of the Ohio; but the fact may be accounted for in many ways other than by ascribing it to the difference which it is claimed exists in the method of rate-making in the two territories. The prejudice against slavery which was entertained by all Europe prevented European immigration to the South, and induced it to the North. Among the immigrants there were numerous skilled mechanics and miners, who developed the mining and manufacturing industries of the North; while the South remained, until after the war, an exclusively agricultural country. Since the war, the industries of the South have become more diversified; and the local non-competitive stations in the South have prospered since the war as much as, if not more than similar non-competitive stations in the North.

In 1872, the Legislature of Ohio enacted a law, which prohibits absolutely the charging of more for a short than for a long haul, regardless of the circumstances or conditions under which traffic is carried.

The census shows that sixty local non-competitive stations in Ohio (having a population, each, of 1,000 or more) increased in population between 1880 and 1890. Those stations are as follows:

Ada, Antwerp, Avondale, Barnesville, Blanchester, Cardington, Carrollton, Cedarville, Chagrin Falls, Chardon, Cleves, DeGraff, Delta, Dennison, Doylestown, Dresden, East Liverpool, East Palestine, Eaton, Elmore, Franklin, Garrettsville, Georgetown, Glendale, Granville, Harrison, Hicksville, Jamestown, Jefferson, Linwood, Logan, Louisville, McConnellsville, Manchester, Minster, Montpelier, Navarre, Nelsonville, New Bremen, New Straitsville, North Amherst, Oberlin, Oxford, Paulding, Piketon, Plain City, Port Clinton, Richwood, St. Bernard, St. Mary, Salem, Salineville, Stryker, Tippecanoe, Wadsworth, Wapakoneta, Wellsville, Westerville, Westwood, and Wyoming.

The total population of those local stations was:

In 1890	125,318
In 1880	92,481
Increase	32,837
Percentage of increase	35 per cent.

The census shows that the following named sixty local non-competitive stations in the South (having a population, each, of 1,000 or more) increased in population between 1880 and 1890, viz.:

Auburn, Ala.; Barboursville, Ky.; Bolivar, Tenn.; Camden, S. C.; Campbellsville, Ky.; Chapel Hill, N. C.; Clinton, Tenn.; Covington, Tenn.; Cullman, Ala.; Cuthbert, Ga.; Darlington, S. C.; Dyersburg, Tenn.; Eatonton, Ga.; Elkton, Ky.; Evergreen, Ala.; Fayetteville, Tenn.; Florence, S. C.; Franklin, Ky.; Franklin, Tenn.; Fort Gaines, Ga.; Glasgow, Ky.; Graniteville, S. C.; Greenville, N. C.; Greenville, Ala.; Lebanon, Ky.; Laurinburg, N. C.; Madisonville, Ky.; Marion, S. C.; Marshallville, Ga.; Maryville, Tenn.; Morganton, N. C.; Monroe, N. C.; Oxford, N. C.; Phœnix, Ala.; Piedmont, S. C.; Pulaski, Tenn.; Randleman, N. C.; Reidsville, N. C.; Rogersville, Tenn.; Salisbury, N. C.; Somerset, Ky.; Sparta, Ga.; Statesville, N. C.; Summerville, S. C.; Sumter, S. C.; Talbotton, Ga.; Tallapoosa, Ga.; Tallassee, Ala.; Thomasville, Ga.; Toccoa, Ga.; Tullahoma, Tenn.; Union Springs, Ala.; Walterboro, S. C.; Washington, Ga.; Washington, N. C.; Waynesboro, Ga.; West End, Ga.; Winchester, Tenn.; Winnsboro, S. C.; Yazoo, Miss.

The total population of those local stations was:

In 1890	124,574
In 1880	77,664
Increase	46,910
Percentage of increase	60.4 per cent.

In other words, it will be seen that taking sixty local non-competitive stations in Ohio, in which State there has been in force since 1872 a long and short haul law, which takes no account of the circumstances and conditions under which traffic is carried, and comparing them with sixty local non-competitive stations in the South, where the Southern system of rate-making has obtained since 1872, the increase in population of said local non-competitive stations in Ohio was only 35 per cent., as against 60 per cent. increase in the population of said sixty Southern local non-competitive stations.

It is to the pecuniary interest of every railroad to develop the traffic of its local stations; and, by that process of development, such stations gradually increase in population, manufactures, etc., until they become so large as to invite the construction of other railroads; and in time they develop into competing points. The process, however, is gradual, and necessarily slow; but it is a *natural* process of evolution. The Commission, however, is not content to await the operation of natural causes; and it proposes, by an artificial process, to place non-competitive stations upon an arbitrary equality with competitive stations. It is contended that such arbitrary process of leveling the railroad rates of the country is not only authorized, but required, by the Act to Regulate Commerce. On the contrary, Judge Deady said:

"Congress never intended to make of this act a Procrustean bed, in which the conduct of the business of all the roads engaged in interstate commerce shall be made to conform to one arbitrary rule, without reference to the probable and even unavoidable difference in the conditions and circumstances under which it must be transacted."

31 Fed. Rep., pp. 320, 321, Ex Parte Koehler.

LI.

The Third Section Continued.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says:

"And although I must express an opinion upon a mere question of policy for the carriers with much diffidence, I am very strongly inclined to the belief that their (the carriers') interests would in the long run be better promoted by adhering more closely to the rules of the statute than was done in the present case, or is likely to be done under the practice which their counsel endeavors to justify."

85 Fed. Rep., p. 113.

The practice to which Judge Severens refers is that of charging more for a shorter than for a longer haul where competition compels the acceptance of lower rates at the longer distance point. His Honor's idea is that if the shorter distance points were not charged more than the longer distance points, the traffic of the shorter distance points would be increased, and, in that way, the carrier's revenue would be increased.

His Honor's opinion upon any question of *law* is entitled to the highest respect; for he is one of the most eminent jurists of the country. His opinion, however, as to the probable effect of any particular mode of rate-making is, of course, the opinion of one who has not had a very extended experience in traffic matters. But whatever weight may be given to his opinion upon the subject, his suggestion involves an experiment the entire expense of which would have to be borne by the carriers.

A similar suggestion was pressed upon Mr. Justice Brewer in the case of Chicago & N. W. Ry. Co. vs. Dey, and in reply thereto he said:

"Again it is said that it cannot be determined in advance what the effect of the reductions will be. Oftentimes it increases business, and who can say that it will not in the present case so increase the volume of business as to make it remunerative, even more so than at present? *But speculations as to the future are not guides for judicial action.* Courts determine rights upon existing facts. Of course there is always a possibility of the future; good crops may increase transportation business, poor crops reduce; high or low rates may likewise affect; but the only fair judicial test is to apply the rates to the business that has been done in the past, and see whether upon that basis such rates will be remunerative, or compel the transaction of business at a loss."

35 Fed. Rep., p. 881, Chicago & N. W. Ry. Co. vs. Dey.

If the Government of the United States desires to conduct experiments in railroad rate-making, as it has a perfect right to do, it should either defray the expense of such experiments, or guarantee the companies against loss resulting therefrom. If the Government should see proper to exercise its right of eminent domain by appropriating the interstate railroad property of this country to its own use, I have every reason to believe that the owners of railroad property would be more than willing to surrender the railroads to the Government, at anything like a fair valuation. But so long as the Government insists upon the railroads being operated by their owners, the owners ought not to be forced to undertake costly experiments in rate-making which, in the opinion of experienced traffic managers, would result in disastrous failure.

It is fair to assume that the traffic managers of the Southern railroads, who are men of long and varied experience, and some of them of world-wide reputation, are competent judges as to what line of conduct would most tend to increase the revenues of their companies; and the financial condition of Southern railways is such as to justify us in assuming that their traffic

managers have every motive to increase their revenues. The testimony of a number of the most prominent traffic managers in the South was taken in these cases, in the Circuit Court, upon the point as to whether a reduction in the rates to the shorter distance points so as to make them not higher than the rates to the longer distance points, would, or would not, tend to increase the revenues of the defendants. In every instance their opinion was in the negative; and they gave their reasons for the opinions that they expressed.

See depositions as follows:

	Trans. No. 69.	Trans. No. 68.	Trans. No. 70.
van den Berg.	pp. 110, 111	61, 62	77, 78
Culp	pp. 123, 124	81, 82	66
Brown	pp. 139, 140	123	108
Lutz.	pp. 157, 158	129, 130	114, 115
Winburn.	pp. 167, 168	138, 139	. . . . .
Knox	pp. 174	146, 147	123, 124
Biles	pp. 187, 188	158	141, 142
Compton.	pp.	92, 93	94
Davant.	pp.	74	. . . . .

Counsel for appellant in argument, in the court below, quoted from an opinion of Hon. Aldace F. Walker, formerly a member of the Commission, in which Mr. Walker expressed the same view as Judge Severens. But it is proper to say that neither Mr. Walker, nor Judge Severens, have ever had any experience in the operation of railroads in Southern territory. A line of conduct which might be eminently wise in Trunk Line territory, where population and traffic are very dense, might be eminently unwise in Southern territory, where the population is sparse; and the volume of traffic, which is light, is scattered at long intervals, through large sections of country, some of which are incapable of supporting even the few people who inhabit them.

Sometimes a reduction in rates will increase the consumption of certain articles, and in that way increase the traffic, and consequently, the revenue of the railways carrying the traffic. But it is by no means true in all cases. In fact, it is true in no case, except where the rate charged for transportation represents so large a proportion of the market value of the article transported, *that it is practicable for the merchant, who sells the article, to give the consumer the benefit of the reduction.* To illustrate my meaning:

By reference to the Report and Opinion of the Commission in case No. 69, it will be noticed that the largest reduction that would have to be made in order to bring the local rates of the Western & Atlantic Railroad down to the level of Atlanta rates is 20 cents per hundred pounds on first-class goods, from Cincinnati to Marietta. Trans. No. 69, p. 23, right col. Dry goods are first class. On a hat weighing six ounces, a difference of 20 cents per one hundred pounds would amount to only 75-1000 of a cent. A difference of 20 cents per hundred pounds on coffee amounts to only two mills per pound; and to a consumer purchasing ten pounds of coffee for domestic use, the difference would amount to only 2 cents.

It is manifest that while such a reduction in rates might enable the merchant to realize a slightly greater profit on his sales to consumers, it would, in most instances, be of no importance whatever, so far as the consumer is concerned. No one would wear any more hats, or drink any more coffee, because of any such reduction in rates; for, even if the merchant were disposed to give the consumer the benefit of the reduction, the amount is too small to make the change.

Counsel referred in argument, in the court below, to what the reduction would amount to on car load quantities. But consumers seldom purchase in car load quantities, and they never purchase in car load quantities the higher classes of freight, such

as dry goods, etc., etc. As before stated, unless the reduction in rates is such as that it is practicable for the merchant to give the consumer the benefit of the reduction, (which is seldom the case as to car load quantities) consumption will not be increased, and therefore neither the volume of traffic carried by the railroad, nor the revenue derived from the traffic by the railroad, will be increased.

Counsel insisted, however, in the court below, that even though the reduction may inure to the benefit of the merchant alone, the merchant is a part of the public, and as such, is entitled to have the reduction ordered in his interest. It must be remembered, however, that the owners of railroad property are also a part of the public, and that their interests are entitled to some consideration. It seems to be a popular idea that whenever a merchant desires to increase his line of profit, all he has to do is to apply to a railroad commission, either State, or Federal, to have his profits increased, by diminishing the profits or dividends of railroad stockholders. Upon this point, in the case of Ricketts, Smith & Co. vs. Midland Ry. Co., Law Rep. (1896), 1 Q. B., p. 266, the English Railway Commission, speaking through Collins, J., said:

"I think, therefore, that the reasonableness of the rate *is not to be tried by its effect upon the trade of the persons who have to pay it.* It may be a prudent thing for a carrier to tempt traffic by charging rates much lower than he would reasonably be justified in demanding, having regard to the elements which I have referred to as primarily affecting the reasonableness of the rate; but this is a question of railway management, which, in my judgment, lies outside our province. *Within these limits he is entitled to get as much as he can, even though he thereby diverts a large part of the merchant's profit into his own pocket.*"

If the rates to the shorter distance points involved in these cases should be reduced, so as to be not higher than the rates to

Atlanta or Opelika, it would doubtless, in some instances, induce merchants at the shorter distance points to purchase their goods in Cincinnati, New York, etc., instead of purchasing them in Atlanta or Opelika, as they have heretofore done. But the volume of their purchases would be no greater than they have heretofore been. The number of their customers would not be increased; the amount consumed by their customers would not be increased; and, therefore, traffic, and the revenue of the railroads, would not be increased. While there might be a *diversion* of a certain portion of traffic from Atlanta or Opelika to the shorter distance points, there would be no substantial *increase* in the aggregate volume of traffic.

Unless reductions in rates are such as *to reach consumers and induce them to use more of the articles* upon which the reductions are made, there can be no *increase* of tonnage produced by such reductions.

LII.

The Third Section Continued.

Counsel for appellant, in the court below, quoted the following from the opinion of this Court in the Joint Traffic Association Case (171 U. S., 505):

"The result of *lower* rates is *generally* a greater demand for the articles transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases *commerce.*"

It will be noticed that this Court undertakes to state a proposition which is only *generally* true; and that it does not affirm it to be universally true. While the Court says that the result of *lower* rates is *generally* a greater demand for the articles transported, it does not say *how much* lower the rates must be made than those theretofore prevailing, in order for the reduction to increase the demand. If the rates to the shorter dis-

tance points should be made the same as the Atlanta or Opelika rates, it might increase the sale at the shorter distance points of some of the classes and commodities; and it might divert some of the traffic from Atlanta or Opelika to the shorter distance points. A mere diversion of traffic from Atlanta or Opelika to the shorter distance points would not, however, increase either the tonnage or the revenue of the appellee companies. In order for the tonnage or revenue of the appellees to be increased, the aggregate amount of merchandise consumed in the territory between Atlanta or Opelika and the shorter distance points must be increased. And the people who reside in that territory cannot be induced to increase their purchases, unless the shorter distance rates shall not only be reduced as low as the Atlanta or Opelika rates, but reduced to a point where the benefit of the reduction, instead of going into the pocket of the merchant, would reach the consumer, and induce him to increase his purchases.

LIII.

The Third Section Continued.

Judge Severens further says:

"And public policy would also be advanced by the opposite course, not only in the encouragement which would thus be given to the distribution of commerce and population, but also in extending that *equality* of privilege which it is one of the prime objects of legislation to promote."

85 Fed. Rep., p. 113.

I have shown in Section XLVI. of this argument that neither the common law nor the Act to Regulate Commerce requires "*equality* of privilege" *except where the services are similar;* and I shall have nothing further to say upon that point. But as to Judge Severens' suggestion that public policy would be advanced by building up the local stations, at the expense of the

competitive stations, I submit that it is no proper function of government to deprive the competitive stations of the natural advantages which they enjoy. When Judge Severens says that public policy would be advanced in the "encouragement which would thus be given to the distribution of commerce and population," he can mean nothing else than that the commerce and population of Atlanta, Opelika and other basing points or trade centers in the country, ought, at least to a certain extent, to be taken away from them and distributed among the small local stations on the railroads which center there. In reply, I repeat the language of Judge Deady that:

"As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give to each one an even chance and a fair show to make the most of his or its opportunities, and leave the result to circumstances over which it has little, if any, direct control."

31 Fed. Rep., 321, Ex Parte Koehler.

I also repeat the language of Judge Speer:

"There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce."

Brewer & Hanleiter vs. Central of Ga. Ry., 84 Fed. Rep., p. 268.

LIV.

The Third Section Continued.

Counsel for the appellant, in the court below, made a vigorous attack upon what he calls the "trade center" or "basing point" system of rate-making, which has been used in the Southern States for many years. Counsel quoted the following description of the system as given by Commissioner Walker:

" Certain large cities and towns situated on the coast, at interior river points, and at railroad junctions, are *called* competitive, and receive quite low rates on all interstate traffic; all other stations are *called* local, and are charged much higher rates. The rates to local points are made by adding to the competitive rates at the nearest competitive point the local rate from that point."

1 I. C. Rep., p. 631, Harwell vs. C. & W. R. R.

It will be noticed that Mr. Walker says that basing points are *"called"* competitive, as if they were so designated as a matter of preference or favor; and that he speaks of them as *"receiving"* quite low rates, as though such rates were given to them by the carriers as a matter of favoritism or partiality.

Judge Cooley was quoted by counsel in argument, in the court below, as saying that the pre-eminence of such trade centers in the Southern territory " is peculiar, and has probably been increased by the *concessions* in rates which the railroads have made to them, while making less *concessions* or none at all to less important stations." . . . " The prevalence of such ideas, and the acting upon them in making freight tariffs, gives to railroad managers a power of determining within certain limits, what towns shall be trade centers, and what their relative advantages."

1 I. C. Rep., p. 278, In Re Southern Ry. & Steamship Assn.

There may be a few mere " railroad junctions " which, owing to the ignorance or corruption of certain railroad officials, have been arbitrarily " called " competitive points, and which " receive " certain arbitrary " concessions " in rates. There may also be a few strictly local stations, which are not even " railroad junctions," where arbitrary and unfair " concessions " in rates have been made, by certain corrupt railroad officials, to enhance the value of property owned at such stations by said officials, or by their relatives or friends.

All such arbitrarily created so-called "trade centers," or "basing points," if any such exist, are the offspring of ignorance or corruption, and justly deserve all that the Commission has said in denunciation of them.

The error of the Commission consists in failing to distinguish between those "trade centers" or "basing points" which may have been arbitrarily created by certain railroad officials, at certain local stations, or at certain railroad junctions, and those "trade centers" or "basing points," which are situated on the sea coast, or other navigable water course, or which, though situated in the interior, have, by reason of their peculiar geographical situation, become the points of intersection of numerous rival railroads, or which, though situated at the intersection of only two rival railroads, have become competitive points by reason of certain exceptional conditions which happen to exist at those points, and which are not to be found at the ordinary local stations, or even at ordinary "railroad junctions."

Norfolk, Richmond, Wilmington, Charleston, Port Royal, Savannah, Brunswick, Augusta, Macon, Mobile, Montgomery, Columbus, Eufaula, etc., are illustrations of "trade centers," or "basing points" which are situated on the sea coast, or other navigable water course.

Competition between numerous water craft enabled them to command exceptionally low rates of transportation, long before a mile of railroad existed on the face of the earth. It is manifestly erroneous to say that they have been arbitrarily favored with exceptionally low rates by the ignorance or corruption of railroad officials. Their rates were always very much lower than those of adjacent interior towns.

When railroads were first constructed to those "trade centers," or "basing points," they found them in the enjoyment of exceptionally low rates, as compared with adjacent interior

towns; and they simply recognized the rate situation as they found it.

It was impossible for the railroad officials to have increased the rates to those "trade centers," or "basing points;" because the same water craft that had reduced the rates in the first instance would have reduced them again, if the railroad officials had attempted to increase them.

Before any railroads were built in Georgia, traffic from New York and other North Atlantic ports, as well as traffic from Cincinnati and other western points, was shipped by water via Charleston, Savannah, Brunswick or Apalachicola, to Augusta, Macon, Eufaula and Columbus.

Certain competitive through rates were charged by the ships and boats from New York and other North Atlantic ports, or from Cincinnati and other western points, to Augusta, Macon, Eufaula and Columbus, and from those "trade centers," or "basing points," the goods were hauled by wagon to interior towns in Georgia, such as Greensboro, Acworth, Hogansville and the other shorter distance points involved in these cases.

Augusta, Macon, Eufaula and Columbus were important "trade centers" in those early days, and their prominence over interior towns, such as Greensboro, Acworth, Hogansville, and the other shorter distance points involved in these cases, was far greater then than now. Greensboro, Acworth, Hogansville, and the other shorter distance points involved in these cases, were then, as now, local, non-competitive points.

The rates from New York and other North Atlantic ports, and from Cincinnati and other western points, to Greensboro, Acworth, Hogansville, and the other shorter distance points involved in these cases, were then, as now, "based" on the through competitive rates from New York and other North Atlantic ports; or from Cincinnati and other western points to

Augusta, Macon, Eufaula or Columbus; to which were added wagon rates from those "trade centers," or "basing points," to Greensboro, Acworth, Hogansville, etc.

We see, therefore, that Augusta, Macon, Eufaula, and Columbus are natural "basing points," for making rates to Greensboro, Acworth, Hogansville, etc.; because they are the nearest natural "trade centers" to those points.

Augusta, Macon, Eufaula, and Columbus are "basing points," or "trade centers," for the further reason that they are situated on navigable water courses, and in the midst of large and fertile territories which are dependent upon them for commercial facilities; and not because of railroad favoritism.

As corroborative of what I have just said in regard to "basing points," or "trade centers," in Georgia, I refer to a volume entitled "Internal Commerce of the United States (1886)," p. 333, published by the Government, which contains an exhaustive review of the commerce of the Southern States; and among other letters, it contains one from Mr. Virgil Powers, with reference to the early means of transportation in Georgia. He says: "The original transportation in Georgia was by means of ox-carts and one-horse carts for short distances, and from two to six-horse teams and wagons for longer distances, across the country.

Transportation on the navigable streams, prior to the introduction of steamboats, was by means of pole-boats and cotton-boxes. Cotton from the interior was shipped by means of boxes varying from 22 to 24 feet wide by 60 to 80 feet long, made of heavy pine timber, with square sides and ends, with the bottoms sloped up at each end. They were steered by a long, heavy oar or sweep, worked from a platform at each end, with several able-bodied men at each sweep to keep the craft from running ashore in the short bends in the crooked streams as they floated down stream to market. These boxes carried from 400 to 600 bales of

cotton each, and on reaching destination they were sold for building material or fire wood, and the men generally walked back home. The pole-boats were much like the flat-boats used now on the Mississippi River, and were covered in to carry freight under deck. They were floated down and steered as the boxes, loaded with cotton below and on deck, and returned up stream by means of long poles pushed by a number of able-bodied men. They carried from 500 to 700 bales of cotton."

"Thus heavy freight was carried into the interior until steamboats were introduced and superseded these rude means of conveyance. These boats and boxes for the transportation of cotton and merchandise were used on the Savannah, Oconee, Ocmulgee, and Chattahoochee Rivers prior to the introduction of steamboats."

Internal Commerce of United States, 1886, p. 333.

Counsel for the appellant may sneer at this citation as being "ancient history." But it certainly sustains my assertion that long before railroads were built, such places as Augusta, on the Savannah River; Macon, on the Ocmulgee River; and Eufaula and Columbus, on the Chattahoochee River; were "basing points" or "trade centers." And it effectively disproves the charge made by the Commission and its counsel that such "basing points" or "trade centers" were arbitrarily created by railroad officials.

It may be contended by counsel for the appellant that the interior towns, such as Greensboro, Acworth, Hogansville, and the other shorter distance points involved in these cases, are entitled to participate in the benefit which has resulted from the construction of railroads; and that they ought not to be remitted to the condition which existed in the days of ox-carts and wagons. I agree that the interior towns are as much entitled as those which are situated upon water courses, to participate in the benefit which has resulted from the construction of the railway sys-

tem; but I contend that they have been benefited by that system; and that they have been benefited even more, in proportion, than the cities situated upon water courses. Instead of paying the high rates formerly charged by wagons, they now have a very much better and more expeditious service by railway. The rates charged by railways are not only much less than those formerly charged by wagons, but they are regulated by the Georgia Railroad Commission, which is organized under a law which requires that the commissioners shall not, " in any way, be the holders of any railroad stocks or bonds, or be the agent or employe of any railroad company, or have any interest in any way in any railroad."

The interior towns, such as Greensboro, Acworth, Hogansville, and the other shorter distance points involved in these cases, are not content, however, with having the benefit of all the competition that exists at the " basing points," or " trade centers," with the addition of only such local railroad rates as the Georgia Railroad Commission may fix as reasonable; but they insist upon having *precisely* the same rates as if they were located *exactly* where the " basing points," or " trade centers," are located.

There are in the South a few " basing points," or " trade centers," which are not situated on the sea coast, or other navigable water course, and which have become competitive points by reason of their peculiar geographical location, which has caused them to be made points of intersection of numerous rival railroads. Atlanta and Birmingham are illustrations of this class of " basing points," or " trade centers."

It is, of course, impossible to explain why large cities should have grown up at the exact points where Atlanta and Birmingham are located, instead of at points 50 or 100 miles distant from them. It is also impossible to explain why so many railroads have been constructed to Atlanta and Birmingham, instead of being constructed to other points, which, to all appearances,

would have presented as many advantages as are offered by Atlanta or Birmingham. But the fact is, as we all know, that those two cities have become points of intersection of numerous rival railroads; and that those railroads, in their strife to share in the transportation of the large traffic of those cities, have reduced the rates to and from them, until the rates are almost as low as those which obtain to and from cities located upon navigable water courses.

It may be argued that it was wrong for so many railroads to congregate anywhere; and especially wrong to congregate at Atlanta or Birmingham; or it may be argued that having congregated at Atlanta and Birmingham the railroads ought to have kept the peace toward each other, and ought not to have indulged in those competitive rate wars which have so reduced the transportation charges at those points.

It is, in effect, contended by counsel for the appellant that the prominence which has been obtained by Atlanta and Birmingham is due alone to railroad favoritism; and that if they had been treated like they should have been, they would to-day be like other railway stations in their vicinity. But Atlanta and Birmingham were as prominent when the Act to Regulate Commerce was passed as they are now; and the question for this Court to decide is whether Congress intended by that Act to deprive such places as Atlanta and Birmingham of their positions, and reduce them to the ranks.

I submit that Congress never intended to interfere with the commercial advantages possessed by any city; whether those advantages were due to natural causes, such as location upon a water course, or to artificial causes, such as the aggregation of capital, the exhibition of business enterprise and sagacity; or even the accident of being selected as the point of intersection of numerous railways.

Congress does not require equality of rates in any case except where there is a similarity of circumstances and conditions. If the circumstances and conditions be substantially dissimilar, it is not the intention of Congress to inquire how the dissimilarity may have originally been created.

There is in commerce, as in politics, such a thing as the "status quo;" and we might as well question the right of Germany to Alsace and Lorraine, as to question, at this day, the right of such places as Atlanta and Birmingham to the commercial prominence which they now possess; and which they have possessed for many years.

Opelika is not situated upon any water course, and it is the intersection of only two railways; but it is affected by certain exceptional conditions which happen to exist at that point, and which are not to be found at ordinary local stations, or even at ordinary railroad junctions; those exceptional conditions are set forth by the Commission in its Report and Opinion, Trans. No. 69, p. 34, left and right col.; p. 55, left and right col. They have been heretofore referred to by me in Section XX. of this argument, and need not be here repeated.

In the cases at bar, the Court of Appeals said:

"The Commission's report says that the present adjustment of rates, to Atlanta is the outcome of severe competition between lines leading from the competing markets, like St. Louis, Baltimore, Cincinnati, etc., and, with some modifications occurring from time to time, has been in effect for a considerable period. While it makes no similar finding with reference to Opelika showing whether or not the adjustment of rates to that point is the outcome of severe competition, either between carrier and carrier, or between market and market, its recitals of what the proof shows as to conditions there are to that effect, and the testimony of numerous creditable witnesses is clear and pointed to

the effect that the adjustment of rates to Opelika is the outcome of controlling competition."

93 Fed. Rep., p. 87, I. C. C. vs. W. & A. R. R. Co. et al.

Again the Court of Appeals said:

"The testimony of the witnesses and the report of the Commission show that Opelika is not situated on any water course, and is at the intersection of only two railways, but that it is affected by certain conditions which happen to exist at that point and which are not to be found at ordinary local stations or even at ordinary junctions. With its two railroads as terminal carriers, it is connected at comparatively short distances with numerous and extensive systems of rail and water carriage, which make it possible for freight to reach Opelika from the northern and eastern ports, and from Ohio river points by many different routes, the strong competition between which different carriers comes to a focus at Opelika."

93 Fed. Rep., p. 89, I. C. C. vs. W. & A. R. R. Co. et al.

LV.

The Third Section Continued.

"Basing points" or "trade centers" are not confined to the South. Freight tariffs covering the traffic from the eastern seaboard territory to western points were, for many years, established under the rules and regulations of the associations then known as the Trunk Line, and Central Traffic associations. Under agreements of several years' standing, it had been the custom of roads, forming by connections through lines from the seaboard to the West, to determine through rates from New York to Chicago, "and to adopt such rates *as the standard or basis* for the construction of tariffs from other Eastern cities, and points adjacent thereto, which are directly or indirectly in competition for Western business."

"For twenty years or more the rates from Boston to Western competitive points have been the same as from New York. From Philadelphia and Baltimore, the rates are "agreed differentials"—less than New York—the Baltimore rates being also lower than Philadelphia rates."

The agreed rates and distances from New York to Chicago are taken as the standard, or 100 per cent. Through rates to the principal Western cities, towns and junction points in the territory above described, are computed at a percentage of the New York-Chicago rates, based generally on the relative mileage of such points to the Chicago mileage. For example, rates from New York to Indianapolis, Ind., are 93 per cent. of the New York-Chicago rates; Cincinnati, O., 87 per cent.; Columbus, O., 77 per cent.; St. Louis, Mo., 116 per cent., etc., etc. Thus the New York-Chicago rates being at all times applied as the basis would, when changed, create relative changes in the rates to other Western points. In a similar manner the relation as to rates is maintained from the other Eastern cities. When the rates from New York to Western points are changed, like changes are made from Boston, Philadelphia and Baltimore, and points receiving the same rates; the "differentials" as between the Eastern cities being at all times maintained.

Wholesale Prices, Wages and Transportation, Senate Rep., No. 1394, 2d Sess. 52 Con., Part I., pp. 429, 430.

And so with reference to through rates from Kansas and Nebraska points to the seaboard. "The through rates to the Eastern seaboard are generally made on the combination of the rates east and west of the Mississippi River."

Wholesale Prices, Wages and Transportation, Senate Rep., No. 1394, 2d Sess. 52d Con., Part I., p. 552.

The rates and distances from New York to Chicago are taken as the base in the territory between those cities, because of the

water competition from Chicago to New York via the Lakes, the Erie Canal and the Hudson River; and that line of water transportation is the only practicable water line between the northeastern sea coast and the Mississippi River. But the Southern territory is surrounded on the east and south by the Atlantic Ocean and the Gulf of Mexico; and on the west and north by the Mississippi and Ohio Rivers. It is also penetrated by numerous rivers navigable by steamboats from the ocean for considerable distances into the interior.

It is therefore impossible to adopt in the South any one set of rates, or any particular distance, as a standard for making rates for that entire territory. To illustrate, if it were attempted to take the distance, and the rates, from New York to New Orleans, as a standard or basis, and to fix the rates from New York to Norfolk, or from New York to Charleston, or from New York to Savannah, etc., as certain per cents of the rates from New York to New Orleans, such percentage rates could not be maintained like similar percentage rates are maintained between interior cities in the Trunk Line territory; because they would be cut, in almost every instance, either by the all water lines, or by the rail and water lines.

That peculiar difficulties surround the rate situation in the South is conceded by the Commission, itself, in the following language:

"A study of the conditions under which railroad traffic in certain sections of the country has sprung up is necessary to an understanding of the difficulties which surround the subject. The territory bounded by the Ohio and the Potomac on the north, and by the Mississippi on the west, presented to the Commission an opportunity, and also an occasion, for such a study. *The railroad business of that section has grown to be what it is in sharp competition with water carriers, who not only have had*

the ocean at their service, but by means of navigable streams were able to penetrate the interior in all directions."

First Annual Report Interstate Commerce Commission (1887), p. 16.

The only possible way by which the basing system employed in the Trunk Line territory could be made applicable in the Southern territory, would be to subject all carriers by water to the Act to Regulate Commerce, and to establish by legislative enactment or otherwise, certain relative maximum *and minimum* rates to and from all of the principal points in the South; and then require all carriers, whether by rail, or by water, to maintain the rates so fixed.

LVI.

The Third Section Continued.

In his argument, in the court below, counsel for the appellant contended that as all of the lines reaching the longer distance points involved in these cases charge the same rates to those points, and as those rates are what are known as "agreed rates," there is no real competition at those points. Or, to state it differently, that instead of there being competition at those points, there is an agreement *not* to compete.

This position is inconsistent with another position taken by counsel, and which is discussed in Section XXXV. of this argument. In the position discussed in that section, counsel referred to the fact that certain witnesses testified that at the time the Act to Regulate Commerce was passed, and prior thereto, and since, the greater charge for the shorter than the longer haul *only existed in cases of competition at the longer distance points*, and he argued that, as Congress knew that fact, it did not intend that competition should be an excuse, except in certain *extreme* cases, etc.

In one position, he contends that competition is the sole cause for charging less for a longer than for a shorter distance; and in the other position he contends that there is no real competition at the longer distance points.

Counsel referred to certain traffic agreements between competing railroad companies which were considered by this Court in U. S. vs. Trans-Missouri Freight Association, 166 U. S., p. 290; and U. S. vs. Joint Traffic Association, 171 U. S. page 505. The agreements before the Courts in those cases were held to be violative of the Anti-Trust Act because their effect was to restrict competition.

As held by this Court in those cases, the object of the Traffic Association agreements then under consideration was to restrain within certain limits the competition which existed at the points covered by said agreements.

The very fact that such agreements were made, is the best evidence that competition did exist at the points covered by them.

If competition is not the compelling force which has caused the appellee carriers to accept lower rates at the longer distance points, why have they done so? Have they voluntarily sacrificed their revenue at those points?

The Commission concedes and reports that "the present adjustment of rates to Atlanta is the outcome of severe competition."

Trans. No. 69, p. 24, right col.

And the Court of Appeals finds and declares that "the adjustment of rates to Opelika is the outcome of controlling competition."

93 Fed. Rep., p. 87, I. C. C. vs. W. & A. R. R. Co. et al.

In the cases at bar the Court of Appeals replying to a similar argument said:

"It is true that with reference to both points, *i. e.*, Atlanta and Opelika, the longer distance points in these cases, the force of this competition has been recognized by the respective appellees, and its influence has, by agreement between them, been so adjusted as to fix the rates to each of these points; but witnesses showing thorough competency to testify to the fact, state that this adjustment of the rates has been brought about and is maintained by the force of the competition bearing upon those points. It is argued by counsel for the appellant that by this agreement as to rates, the carriers have contracted to not compete. But it is not shown or reasonably suggested on what ground or for what consideration the competing carriers consented to accept a lower rate to these longer distance points than they charge to the shorter distance points, if they could just as well have agreed and contracted to charge as great or greater rates to the longer than to the shorter distance points."

93 Fed. Rep., pp. 87, 88, I. C. C. vs. W. & A. R. R. et al.

The Commission itself finds and reports, that competition at Atlanta has been effective for a considerable period.

Trans. No. 69, p. 24 right col. and 25 left col.

And that the competition at Atlanta includes both the competition of markets for supplying goods to Atlanta, *and the competition of carriers* for the carriage of freight to that point from eastern and western cities.

Trans. No. 69, p. 24 left and right cols.

LVII.

The Third Section Continued.

In his argument, in the court below, counsel for the appellant contended that, inasmuch as the orders of the Commission are simply that the rates to the shorter distance points shall not be

higher than those to the longer distance points, they may be complied with by giving the shorter distance points rates as high as those to the longer distance points, and that this privilege or option given to carriers to make the rates to the shorter distance points as high as to the longer distance points, *thus ignoring the natural advantage of the former in being the shorter distance points*, is all that can be asked by the carriers, *and is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in these cases.*

If the Commission had the legislative power to prescribe rates to be charged in the future, as it at one time claimed to have, I could understand such expressions as " the Commission ignoring the natural advantages of the shorter distance points."

With an arbitrary rate-making power at its command, it could, with impunity, ignore the natural, or commercial advantages of any city in the Union, and there would be no practical relief, however capricious its action might be.

But, as the Commission has no legislative power, and must act as a quasi judicial tribunal, what right has it to " ignore the natural advantages " of the shorter distance points, if they have the legal right to enjoy those advantages?

I have shown in Section XLV. of this argument that if it constitutes unjust preference in favor of the longer distance points to charge less rates to them than to the shorter distance points, it constitutes unjust prejudice against the shorter distance points to charge as high rates to them as to the longer distance points; and that if distance is to be the controlling factor, the rates to the shorter distance points and to the longer distance points, respectively, as well as all other rates, must be constructed *on a mileage basis.*

If the shorter distance points are entitled to have their rates constructed on a mileage basis, neither the Commission nor the

Court has the right to "ignore their natural advantage," in being the shorter distance points.

But if it be held that the shorter distance points involved in these cases are entitled to have their rates constructed on a mileage basis, every other city and station has the same right; and all rates in this country must be constructed on that basis.

Neither the Commission, nor the Court, has any more power than a railroad, to subject the shorter distance points to any unjust prejudice; and if they are entitled to have rates constructed on a mileage basis, the Commission and the Court, as well as the railroads, should say so, and not "ignore their natural advantage," by subjecting them to rates as high as those to the longer distance points.

When counsel says that the privilege given the carriers to charge to the shorter distance points, rates as high as those to the longer distance points, "is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in these cases," he concedes that a dissimilarity of conditions *has* resulted from that competition; and yet he fails to explain why it would be a reasonable allowance for that dissimilarity, to permit the carriers to charge to the shorter distance points rates exactly as high as those to the longer distance points, and yet not one cent higher. It is quite easy to make such assertions, but quite impossible to suggest any intelligible reason in support of them.

In the cases at bar, the Court of Appeals in replying to a similar argument of counsel, said:

"If the mere charging of a greater rate for the shorter than for the longer haul, gives an undue and unjust preference to the longer distance points, and subjects the shorter distance points to any undue prejudice or disadvantage, it is difficult to see how

the charging exactly the same rate for the shorter haul that is charged for the longer shall escape condemnation."

93 Fed. Rep., p. 91, I. C. C. vs. W. & A. R. R. et al.

In Section XLII. of this argument I showed that it is practically impossible to construct rates upon any "scale of comparison between the dissimilarity of conditions and the disparity of rates;" and it is equally impossible to affirm, with any basis of reason to support it, that a certain relation of rates constitutes "a reasonable allowance for dissimilarity of conditions resulting from competition."

It is easy enough to make the *assertion* that a certain relation of rates constitutes "a reasonable allowance for dissimilarity of conditions resulting from competition;" but such an assertion, if made by a quasi judicial tribunal, should be supported by some good reason.

The legislative department has the power to arbitrarily declare that any particular relation of rates shall *be deemed* to be reasonable; whether it be reasonable in fact, or not—provided it does not amount to confiscation of the carrier's property.

Congress has the power to arbitrarily declare that all interstate rates shall be made upon a mileage basis; without being able to assign any good reason for doing so.

So, Congress has the power to arbitrarily declare that under no circumstances or conditions, shall a greater charge be made for a shorter, than for a longer distance; and it may do so without being able to assign any good reason for its action.

But when a quasi judicial tribunal declares that all interstate rates shall be made upon a mileage basis; or that under no circumstances or conditions shall a greater charge be made for a shorter than for a longer distance, it must be able to assign some good reason for its decision; and that reason must show *that*

rates made otherwise than as directed by the Court, violate some provision of the Act to Regulate Commerce.

Congress has the power to arbitrarily declare that the rates to the shorter distance points in these cases shall be not higher than the rates to the longer distance points; and it may do so without being able to assign any reason for its action. But before this Court can be asked to judicially declare that the privilege given the carriers to make the rates to the shorter distance points as high as to the longer distance points " is a reasonable allowance for any dissimilarity of condition resulting from the competition shown in these cases," the Court must be furnished by counsel with some good reason to support the declaration.

Every reason that can be assigned to show that the shorter distance rates should not be higher than the longer distance rates, can be assigned to show that the shorter distance rates should be lower than the longer distance rates; and lower in the exact proportion that the shorter distance mileage is less than the longer distance mileage.

But as such a course of reasoning would lead to the requirement of mileage rates all over the country, this Court is not asked by counsel to follow the reasoning to its inevitable conclusion; but the Court is asked to follow it a part of the way, and then to arbitrarily reject it for the remainder of the way.

LVIII.

The Third Section Continued.

In his argument in the court below, counsel for the appellant referred to a statement in the opinion of this Court in the case of Union Pacific Co. vs. Goodrich, 149 U. S., p. 680, to the effect that the Act to Regulate Commerce was designed to " cut up by the roots the entire system of rebates and discriminations

in favor of particular localities, special enterprises, and favored corporations."

The word "rebates" as used by the Court manifestly refers to "*special* rebates" mentioned in section 2 of the Act to Regulate Commerce, and which are prohibited only when they are given to one person, and refused to another, where the service to both is rendered under substantially similar circumstances and conditions.

The word "discrimination" as used by the Court manifestly refers to "*unjust* discrimination" mentioned in said section; because the same Court held that the act prohibits only such discriminations or preferences "as are *unjust* and *unreasonable.*"

145 U. S., pp. 276, 277, I. C. C. vs. B. & O. R. R.

LIX.

The Orders Made by the Commission in These Cases Are Not Lawful Under the Second Section of the Act.

The second section of the Act to Regulate Commerce is:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

24 U. S. Stat. at Large, pp. 379, 380.

The second section was construed by this Court, in Wight vs. U. S., 167 U. S., pp. 516-518. In that case, a railroad company charged one shipper a higher rate than another shipper for the carriage of beer from the same place of shipment (Cincinnati) to the same destination (Pittsburg). The Court held that the phrase "under substantially similar circumstances and conditions," *as used in the second section*, refers to the matter of carriage, and does not include competition. The Court said that it was the purpose of *the second section* to enforce equality between shippers, and to prohibit "any rebate or other device by which two shippers, shipping over the same line, *the same distance*, under the same circumstances of carriage, are compelled to pay different prices therefor."

In other words this Court construed the second section of our Act as being the equivalent of what is known as the English "Equality Clause;" which is a clause of Section 90 of the English "Railway Clauses Act, 1845."

The English "Equality Clause" requires equality of charge in no case except where goods pass *"only* over the *same portion of the line* of railway under the same circumstances."

2 Ann. Rep., I. C. C. (1888), p. 89.

The English "Equality Clause" has no application where the freight of one shipper, though carried over the same portion of the line, is carried a greater distance from a common point of departure than the freight of another shipper. In such a case, the freight carried the greater distance, would pass "over the same portion of the line" as the freight carried the lesser distance; but the freight carried the greater distance would also pass over an *additional* portion of the line; and, therefore, the two shipments would not pass *"only* over the same portion of the line."

Law Rep., 21 Q. B. (1888), pp. 217, 218, L. & Y. Ry. Co. vs. Greenwood.

It is evident that where goods pass *"only* over the same portion of the line," or " between the *same* points of departure and arrival," there cannot be any substantial dissimilarity of circumstances and conditions, *so far as competition is concerned.* Because, whatever competition may exist on that portion of the line affects all shippers equally. And if, by reason of such competition, a railroad company sees proper to accept certain rates from one shipper, it must, by the express terms of the " Equality Clause," accept the same rates from any other shipper, in respect of all goods of the same description, passing between the same points, of departure and arrival.

The English " Equality Clause " did not apply either where the points of departure were different; or where the points of arrival were different; or where the distances over which the goods were carried were different.

Law Rep., 21 Q. B. (1888), pp. 217, 218, L. & Y. Ry. Co. vs. Greenwood.

And so, this Court held that the *second section* of our Act applies only where two or more shippers ship " over the same line, *the same distance,* under the same circumstances of carriage."

In the cases at bar, goods destined to the shorter distance points do not pass over the " same distance " as goods shipped to the longer distance points.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., which was a case involving the long and short haul clause, Judge Severens held that the case was not one " to which the second section is applicable."

85 Fed. Rep., 119.

LX.

The Orders Made by the Commission in These Cases Are Not Lawful Under the First Section of the Act.

The first section enacts that all charges "shall be reasonable and just."

24 U. S. Stat. at Large, p. 279.

Mr. Justice Brown, in delivering the opinion of this Court, in the case of I. C. C. vs. B. & O. R. R., said:

"A charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination, or an unreasonable preference, under sections 2 and 3."

145 U. S., 277, I. C. C. vs. B. & O. R. R.

81 Fed. Rep., p. 804, Kinnavey vs. Terminal R. Assn.

Section 2 was passed to provide for that class of cases where a difference in rates constitutes an unjust discrimination.

Section 3 was passed to provide for that class of cases where a difference in rates constitutes an undue preference.

Section 4 was passed to provide for that class of cases where a difference in rates constitutes a greater charge for a shorter than for a longer haul, etc., under substantially similar circumstances and conditions.

Section 1 was passed to provide for that class of cases where the sole question involved is whether a given rate is reasonable and just, in and of itself, even though it does not constitute an unjust discrimination, nor an undue preference, nor a greater charge for a shorter than for a longer distance.

LXI.

The First Section Continued.

In the case of Harding vs. C., St. P., M. & O. R. Co., decided in 1887, which was one of the earliest cases decided by the Commission, the Commission held that "on a petition charging the exaction of *unreasonable* rates, *the burden of proof is on the petitioner* to sustain the charges by evidence which shows with reasonable certainty that they are in substance true."

See 1 I. C. Rep., p. 375.

In the case of Brewer & Hanleiter vs. Louisville & Nashville Railroad Company, decided in 1897, and which is one of the latest cases decided by the Commission, the Commission reiterated the doctrine that the burden of proving that a rate is in and of itself *unreasonable* is upon the complainant.

See 7 I. C. Rep., p. 234.

Counsel for the appellee contended, in the court below, that as the facts which are necessary to enable the Court to determine the reasonableness of rates are peculiarly within the knowledge of the appellants, the burden of proving those facts ought to be placed upon them.

The contention of counsel is directly antagonistic to the decision of the Commission in the two cases just cited.

Counsel ignores the fact that Section 20 of the Act to Regulate Commerce authorizes the Commission to require annual reports from all interstate railroad companies, and to require from them "specific answers to all questions upon which the Commission may need information." Counsel also ignores the fact that interstate railroad carriers make annual reports to the Commission, showing in detail many of the facts which are proper to

be considered in determining the reasonableness of rates; and if any additional facts are desired by the Commission, all that it has to do is to call for them under the twentieth section of the Act, or to take the depositions of appellants' officers.

Counsel for the appellee contended, in the court below, that the appellants recognized that the burden of proof was upon them, by taking the testimony of certain expert witnesses, to the effect, that, in their opinion, the rates to the shorter distance points are just and reasonable. The appellants, knowing that the report and opinion of the Commission would be relied upon as prima facie evidence of the facts, took their testimony in the Circuit Court in advance of any testimony that was taken by the Commission; and not knowing what testimony the Commission would take in that Court upon the question as to the reasonableness of the rates to the shorter distance points, the appellants took said expert testimony; not because they supposed that the burden of proof was upon them, under the first section, but to anticipate any proof upon the subject that the Commission might afterwards take.

The question as to what is a reasonable and just rate to be charged for the transportation of a given class of freight, for a given distance, over a given railroad, is one of great difficulty, even when considered by the most competent experts. Railroad traffic managers, and freight agents, are generally men of a high order of intelligence, who have devoted many years of their lives to the adjustment of rates; and when they have, upon mature consideration, arrived at the conclusion that a given rate is reasonable and just, it may, even upon that ground alone, be fairly presumed, especially in the absence of proof to the contrary, that such conclusion is correct.

LXII.

The First Section Continued.

In the case of Ames vs. U. P. Ry. Co., Mr. Justice Brewer used this language:

"But the grave question still remains, are the rates prescribed in this Act as the maximum over which the railroad companies may not go, unreasonable, and so unreasonable as to justify the Court in staying its operation? *No more difficult problem can be presented than this.* There are so many matters which enter into it, and which must be taken into consideration, before a satisfactory answer can be reached."

64 Fed. Rep., 173, Ames vs. U. P. Ry. Co.

In the same case, reported under the style of Smyth et al. vs. Ames (known as the "Nebraska Freight Rate Case"), this Court said: "How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question."

169 U. S., p. 546.

176 U. S., pp. 172-180, C. M. & St. P. Ry. Co. vs. Tompkins.

In the case of U. S. vs. Freight Association, 166 U. S., p. 331, Mr. Justice Peckham used this language:

"What is a proper standard by which to judge the fact of reasonable rates? Must the rates be so high as to enable the return *for the whole business* done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, *what is a fair and reasonable profit?* That depends sometimes upon *the risk incurred,* and the rate itself differs in different localities; which is the one to which reference is to be made as the standard? Or is the reasonableness of

the profit to be limited to *a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended?* Or is still another standard to be created, and the reasonableness of the charges tried by *the cost of the carriage* of the article, and a reasonable profit allowed on that? And in such case would *contribution to a sinking fund to make repairs upon the roadbed and renewal of cars,* etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the *charges for the transportation of the same kind of property made by other roads similarly situated?* If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent therefore, that *it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation.*"

The italics are mine.

166 U. S., pp. 331, 332.

See also 81 Fed. Rep., pp. 551, 552, Van Patten vs. C. M. & St. P. Ry. Co.

In the case of Smyth et al. vs. Ames et al., Mr. Justice Harlan said:

"We hold, however, that the basis of all calculations as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be *the fair value* of the property being used by it for the convenience of the public. And in order to ascertain that value, the *original cost of construction,* the amount expended in *permanent improvements,* the *amount and value of its bonds and stock,* the *present, as compared with the original, cost of construction,* the probable *earning capacity* of the property under particular rates prescribed by statute, and the sum required to meet *operating expenses,* are

all matters for consideration, and are given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smyth et al. vs. Ames et al., 169 U. S., pp. 546, 547.

In the cases which have involved the question as to the *reasonableness* of rates, " labyrinths of tables, figures, and estimates," were presented in the testimony, discussed by counsel in their briefs, and considered by the Court with the closest scrutiny and greatest patience, as will be seen by reference to the opinions in:

64 Fed. Rep., pp. 179 to 194, Ames vs. U. P. Ry. Co.

78 Fed. Rep., pp. 263-275, Southern Pacific Co. vs. Board of R. R. Comrs.

154 U. S., pp. 402-413, Reagan vs. Farmers' Loan & Trust Co.

169 U. S., p. 466, Smyth et al vs. Ames et al.

176 U. S., pp. 172-180, C. M. & St. P. Ry. Co. vs. Tompkins.

In the cases at bar, there will not be found either in the testimony taken before the Commission, or in the testimony taken in the Circuit Court, any sufficient evidence of the various and numerous facts suggested by Justices Peckham and Harlan as proper to be considered in determining what are reasonable rates. Nor will there be found any sufficient evidence of the various and numerous facts that were actually considered by the Court in determining what were reasonable rates in the cases cited above.

I submit, therefore, that the evidence is wholly insufficient to enable either the Commission, or this Court, to intelligently decide that the rates to the shorter distance points involved in these cases are unreasonably high in and of themselves.

The Commission did not decide that the rates to the shorter distance points were unreasonably high. On the contrary, it treated the matter of *"unreasonable"* rates as merely subsidiary.

Trans. No. 69, p. 22 right col.

LXIII.

The First Section Continued.

In the case of Ames vs. U. P. Ry. Co., Mr. Justice Brewer said:

"The foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable; and when the strong arm of the Legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors. There can be no justice in that which works to such investors a practical destruction of their property, thus invested. It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere, and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

64 Fed. Rep., 176, 177, Ames vs. U. P. Ry. Co.

176 U. S., pp. 172-180, C. M. & St. P. R. R. Co. vs. Tompkins.

"Justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."

154 U. S., 412, Reagan vs. Farmers' L. & T. Co.

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smyth et al. vs. Ames et al., 169 U. S., p. 547.

The Commission has failed to prove the value of either one of the railroads involved in these cases; and therefore it has failed to prove that the rates charged to the shorter distance points yield more than "a fair return upon the value of that which" appellees employ "for the public convenience."

LXIV.

The First Section Continued.

In order to ascertain whether a railroad company has, during any given period, received any compensation for the use of its property, it is necessary to know the results of its operations *as a whole*. The result of its operations as to any particular article, as coal, pig iron, etc., is of no value; because, though it may have carried those articles at or even under cost, the other articles carried by it may have yielded more than a reasonable profit upon the entire investment.

And so, though it may have carried some articles at rates which, looked at by themselves, would appear to be excessive, yet when considered in connection with the rates charged on the entire volume of traffic carried by it, will be found to be insufficient to yield a fair return upon the value of the road.

In the case of the Chicago & N. W. Ry. Co. vs. Dey, Mr. Justice Brewer said:

"Coming now to the question of the schedule as presented, I remark that the schedule, *as a whole*, must control, and its validity or invalidity *does not depend upon the sufficiency or insufficiency of the rates for any few particular subjects of transportation.*"

35 Fed. Rep., p. 881, C. & N. W. Ry. Co. vs. Dey.

In the case of Chicago, etc., Ry. Co. vs. Minnesota, Mr. Justice Miller, in a concurring opinion, said:

"That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its Commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fares as excessive, or establishing its right to collect the rate as being within the limit of a just compensation for the service rendered."

"That until this is done, *it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the question which ought to be settled in this general and conclusive method.*"

134 U. S., p. 460, Chicago, etc., Ry. Co. vs. Minnesota.

In its Eleventh Annual Report, the Commission states that the classifications now in use in this country embrace from 5,000 to 7,000 items.

11 Ann. Rep., I. C. C. (1897), p. 66.

How would it be possible for any tribunal to ascertain what would be a reasonable rate upon one of those items; as for instance, coal, or pig iron, without taking into consideration any of the remaining five or seven thousand articles?

In the cases at bar, the Court is asked to decide what are reasonable rates to the shorter distance points.

In case No. 69, the only rates involved are those from Cincinnati and other Ohio River points, to five local stations on the Western & Atlantic Railroad.

In case No. 68, the only rates involved are those from New

York and other North Atlantic ports, to six local stations on the Georgia Railroad.

In case No. 70, the only rates involved are those from New York, via Charleston, Augusta and Atlanta, to five local stations on the Atlanta & West Point Road.

It is evident that the Western & Atlantic Railroad carries a large amount of traffic that originates elsewhere than at Cincinnati and other Ohio River points; and that it carries a large amount of traffic that is not destined to the particular local stations involved in case No. 69.

It is evident that the Georgia Railroad carries a large amount of traffic that originates elsewhere than at New York and other North Atlantic ports; and that it carries a large amount of traffic that is not destined to the particular local stations involved in case No. 68.

It is evident that the Atlanta & West Point Railroad carries a large amount of traffic that originates elsewhere than at New York and other North Atlantic ports; and that it carries a large amount of traffic that is not destined to the particular local stations involved in case No. 70.

And yet, the Court is asked to single out the traffic destined to those particular local stations, from the particular points of shipments specified in the respective petitions, and to decide what are reasonable rates on those particular classes of traffic, without regard to what may have been the results of the operations of those companies under their schedules taken "as a whole."

LXV.

The First Section Continued.

The distance from Cincinnati to Marietta via the appellees' line in case No. 69 is 453 miles.

Trans. No. 69, p. 23 right col.

The appellees' rates for transporting freight from Cincinnati to Marietta are the following, in cents per 100 lbs., except as to class F, which is in cents per barrel of 200 lbs:

CLASSES	1	2	3	4	5	6	A	B	C	D	E	H	I
	127	109	96	79	65	50	38	45	35	30	56	65	62

Trans. No. 69, p. 23 right col.

The distance from New York via Augusta to Stone Mountain in case No. 68 is 1,032 miles.

Trans. No. 69, pp. 27 left col. and 35.

The appellees' rates for transporting freight from New York to Stone Mountain are:

CLASSES	1	2	3	4	5	6	A	B	C	D	E	H	I
	132	114	101	85	71	58	45	57	47	44	69	80	89½

Trans. No. 69, p. 27.

The distance from New York via Atlanta to West Point in case No. 70 is 971 miles.

Trans. No. 69, p. 35.

The appellees' rates for transporting freight from New York to West Point are:

CLASSES	1	2	3	4	5	6	A	B	C	D	E	H	I
	142	124	110	93	77	62	—	—	—	—	—	88	—

Trans. No. 69, p. 34.

I have in each case selected the shorter distance point to which the rates are highest.

It will be noticed that even if the tonnage carried were equally divided between the thirteen classes the average rates would be as follows in cents per 100 lbs., viz.:

From Cincinnati to Marietta..... 63 cents.
From New York to Stone Mountain..... 76 cents.

And on the seven classes complained of, in case No. 70, the average rate from New York to West Point would be ..... 98 cents.

I insist, with the utmost confidence, that such average rates are not only reasonable and just for transporting 100 pounds of freight such distances, but that they are exceedingly low rates. They are certainly lower rates than can be obtained by any other means of transportation, except rail.

	Trans. No. 69.	Trans. No. 68.	Trans. No. 70.
van den Berg.	p. 112	62	81
Culp	p. 124	82	69
Compton	p. . . .	93	99

I feel quite sure that history will not record an instance where 100 pounds of freight has been transported such distances for such average rates by any means of land transportation, other than rail.

How can it be affirmed with any degree of fairness that a rail

rate is unreasonably high, when it is shown to be less than ever has been obtained by any other means of land transportation?

Freight is generally transported by railroads a given distance in less time, and in better condition, than by any other means of transportation; and why should railroads be required to render this superior service at less rates than are charged by any other means of land conveyance?

It is contended by counsel for appellee that it is unfair to compare railroad rates with wagon rates, for the following, among other reasons:

1. Where a wagon or cart carries one ton of freight, a railroad carries thousands.

2. Where a wagon or cart carries freight one mile, a railroad carries it hundreds, or thousands, of miles.

3. Wagons and carts have no monopoly of transportation over a particular roadway.

As to the first and second reasons, it is true that a railroad train, or even a single freight car, can carry a much larger quantity of freight than can be carried in a wagon or cart. It is also true that railroads, by joining in through rates and through routes, can carry freight for much greater distances than it is usually carried in wagons or carts. But the fact that railroads can carry larger quantities of freight, for greater distances, than can be done by wagons or carts, simply demonstrates the superior service which railroads can and do render to the public. It furnishes no reason for holding that because they can, and do, render a superior service, they shall render it for a less rate than is charged for a vastly inferior service.

If it be said that as railroads can carry larger quantities of freight, and for greater distances within a given time, it is evi-

dence that they can afford to carry at a less rate per ton per mile than the rates charged by wagon, the answer is two-fold:

First: The financial result of the operations of the railroads in the United States since the inauguration of the railroad system, is one of almost universal bankruptcy. It is extremely doubtful whether 500 miles of connected railway can be found in the United States which has not, at some time or other, gone through bankruptcy.

No one can affirm with any degree of confidence what is the relative cost of railroad transportation as compared with the cost of wagon transportation.

Second: But whether railroads can afford to do so, or not, it is conceded that they do carry not only at very much less rates per ton per mile, than rates charged by wagon; but at rates so much less than wagon rates as to have driven wagons out of competition in all cases except where the transportation is for relatively short distances.

As to the suggestion that wagons and carts have no monopoly of transportation over a particular roadway, it is sufficient to say that, on the other hand, they are entirely relieved of the expense of constructing roadways, and contribute but little toward their maintenance.

As to the suggestion that railroads have a monopoly of transportation over their roadways, it is sufficient to say that they are subjected by law to severe government supervision and control, with a view to preventing them from using their monopoly to the detriment of the public. They are strictly prohibited from making any unjust discrimination, or giving any undue preference, or charging any unreasonable compensation.

The question, however, as to what is a reasonable compensation for a railroad to charge in a given case has been left by the

law to the final determination of the courts; and in considering that question, there is nothing in the law to prevent the courts from comparing rail rates with rates charged by wagon, by pack mules, or by any other means of land transportation.

LXVI.

The First Section Continued.

Appellees' rates to the shorter distance points have not prevented the shipment of freight; but, on the contrary, traffic has been shipped with profit under those rates, and has moved freely in competition with traffic to and from other points.

	Trans. No. 69.	Trans. No. 68.	Trans. No. 70.
Culp . . . . . p. 124		82	69
Compton . . . . . p. . . .		93	99

I submit with confidence that no set of rates can be condemned as unreasonable or unjust, *in and of themselves*, where the proof shows, as it does in these cases, that traffic has moved freely under those rates, and at a profit to the shipper or consignee.

LXVII.

The First Section Continued.

The following named witnesses, all of whom are experts in traffic matters, testify that, in their opinion, the rates to the shorter distance points involved in these cases are just and reasonable:

	Trans. No. 69.	Trans. No. 68.	Trans. No. 70.
van den Berg. . . . . pp. 111, 112		61, 62	81
Culp . . . . . pp. 123, 124		82	68, 69

Brown. . . . . pp.	140, 141	123, 124	110
Lutz. . . . . pp.	158, 159, 160	130, 131	116
Winburn. . . . . pp.	167, 168	139	. . .
Knox. . . . . pp.	174	147	126
Biles . . . . . pp.	187, 188	158, 159	144
Compton. . . . . pp.	. . . . .	92, 93	99
Davant. . . . . pp.	. . . . .	74	. . .

The reasons given by said witnesses for their opinions are, among others, the following:

Said rates are fixed upon the lowest obtainable combinations; and traffic to such shorter distance points has the benefit of whatever competitive rates may exist at the nearest basing point, to which are added only such local rates to destination as the Georgia Railroad Commission may fix as reasonable.

	Trans. No. 69.	Trans. No. 68.	Trans. No. 70.
van den Berg. . . . pp.	112	62	81
Culp . . . . . pp.	124	82	69
Brown. . . . . pp.	140, 141	123, 124	110
Winburn. . . . . pp.	167, 168	139	. . .
Knox . . . . . pp.	174	147	126
Compton. . . . . pp.	. . . . .	93	99
Davant. . . . . pp.	. . . . .	74	. . .

Said rates to the shorter distance points have not prevented the shipment of freight; but, on the contrary, traffic has been shipped with profit under those rates, and has moved freely in competition with traffic to and from other points.

	Trans. No. 69.	Trans. No. 68.	Trans. No. 70.
Culp. . . . . pp.	124	82	69
Compton. . . . . pp.	. . .	93	99

Said rates to the shorter distance points are relatively just, as compared with rates to other points in the same section of the country similarly situated.

	Trans. No. 69.	Trans. No. 68.	Trans. No. 70.
Culp	pp. 124	82	69
Winburn	pp. ...	139	...
Biles	pp. ...	159	144

Said rates to the shorter distance points are not higher than are charged from other points of distribution to stations on other roads, under similar circumstances and conditions.

	Trans. No. 69.	Trans. No. 68.	Trans. No. 70.
Lutz	pp. 159	131	116
Biles	pp. 188	158, 159	144
Davant	pp. ...	74	...

Said rates to the shorter distance points compare favorably with other rates for similar distances and services.

	Trans. No. 68.	Trans. No. 70.
Knox	pp. 147	126
van den Berg	pp. 62	81

Said rates to the shorter distance points are lower than prevail in some of the other sections of the country.

van den Berg, Trans. No. 69, pp. 111, 112.

Said rates to the shorter distance points are lower than can be obtained by any other known means of transportation.

	Trans. No. 69.	Trans. No. 68.	Trans. No. 70.
van den Berg	pp. 112	62	81
Culp	pp. 124	82	68, 69
Compton	pp. ...	93	99

Said rates to the shorter distance points do not yield the carriers excessive revenue for the service performed.

Knox, Trans. No. 68, p. 147.
" " No. 70, p. 130.

It will be noticed that the reasons given by said witnesses for their opinions are eminently practical: and such as commend themselves to any one who considers rate-making *as a commercial, rather than a mathematical problem.* And I submit that the plain, practical, commercial reasons given by said witnesses for their opinions are of infinitely more value than *the mathematical or arithmetical calculations attempted by the Commission;* in which the Commission has attempted to use such statistical factors as the "average receipts per ton per mile;" the "estimated cost of carrying one ton one mile;" the "number of tons carried of freight earning revenue;" the "number of tons carried one mile;" the "average distance haul of one ton;" the "freight earnings per train mile," etc., etc.

In the cases at bar, the Court of Appeals in speaking of the reasonableness of the rates in controversy in those cases, says:

"The most careful consideration of the testimony brought up in the records in these cases does not disclose any evidence that was offered by the appellant (the Commission) in the Circuit Court tending to show that the rates, separately considered, to the respective points, are not reasonable and just; and the replies that were drawn by a most skillful cross-examination from the witnesses, called by the appellees, (the Railroad Companies), do not show or tend to show, that the rates to the respective points are not reasonable and just. On the contrary, the great volume of testimony, given by these witnesses (who show full competency to testify) is directly and clearly to the effect that the rates are reasonable and just. One witness gave as a reason for this opinion (for the subject is hardly susceptible of better proof than the opinion of experts) that the rates are fixed upon

the lowest obtainable combination of the rates to competitive points, with the local rates therefrom to the non-competitive points, so that the traffic to the non-competitive stations has the benefit of whatever reductions competition has effected in the adjustment of rates to the competitive points, and that the rates are lower than prevail in some of the other sections of the country, and lower than can be obtained by any other means of transportation, and are not higher than are charged from other points of distribution to stations on other railroads under similar circumstances and conditions. And another witness says the rates are 'just and reasonable, in that they are not unjustly or unreasonably high. They are lower than the rates at which the property can be transported by any other means of transportation. They have not prevented the shipment of freight. Traffic has been shipped with profit under these rates. They are just, relatively, to rates to other points in the State of Georgia similarly situated. These rates are based upon rates to Chattanooga, which are controlled and fixed by competition, and added to the rates from Chattanooga to the several stations, which are the same for the same distance as the rates fixed by the Railroad Commission of Georgia.' These reasons do not convince the counsel for appellant, (the Commission) but appear to us to have weight."

93 Fed. Rep., pp. 88, 89, I. C. C. vs. W. & A. R. R. Co.

LXVIII.

The First Section Continued.

Counsel for the appellee, in his argument in the court below, instituted certain elaborate comparisons involving what are known as the "average receipts per ton per mile;" and contended that said comparisons demonstrated that the rates to the shorter distance points involved in these cases are unreasonably high.

The " average receipts per ton per mile " of a road cannot be used as a standard of reasonableness for the rates of that road on any particular traffic.

The " average receipts per ton per mile " is ascertained by dividing the " total freight revenue " of a railroad by the " number of tons carried one mile."

The " total freight revenue " of a company is ascertained by adding together the freight charges on thousands or millions of shipments, made under various conditions and circumstances. Some shipments consist of single packages, weighing perhaps less than 100 pounds. Other shipments are made in quantities of more than 100 pounds, but less than car loads; others are made in car load quantities; and others in train load quantities. Some of the freight shipped is very light and bulky, and of considerable value per ton; other freight consists of heavy, coarse articles, of comparatively small value per ton. Some shipments are made over short distances; others over long distances; and others over the entire length of the road. The freight charges per ton, per mile, necessarily vary within wide limits, from 8 or even 10 cents per ton, per mile, on first class freight, carried over only a few miles of the road between local stations, to 3½ mills per ton, per mile, on long-haul coal and mineral traffic, and long distance competitive traffic.

In order to ascertain the " number of tons carried one mile," it is necessary to keep an account of the actual distance each ton is carried. Each ton is then multiplied by the number of miles it is carried, so as to get its equivalent in tons carried one mile; and the aggregate of the equivalents in tons carried one mile shows the " number of tons carried one mile."

Of course, in actual practice, no one ton of freight is ever carried one mile, and the " number of tons carried one mile " is made up of thousands or millions of shipments of different

kinds of freight, carried over different parts of the line, and carried different distances. It is made up of costly silks carried from New York to West Point; and of cheap lime-stone rock carried five miles from some quarry to a furnace.

The "number of tons carried one mile" is of no more value in determining what are reasonable rates on each of the thirteen classes of traffic from Cincinnati to the local stations on the Western & Atlantic Railroad; or from New York to the local stations on the Georgia Railroad, and the local stations on the A. & W. P. Railroad, than the fact that the earth is the equivalent of a certain number of grains of sand, would be in ascertaining the reasonable price of a tombstone.

As stated above, it is by dividing the "total freight revenue" by the "number of tons carried one mile," that we ascertain the "average receipts per ton per mile."

As neither the divisor nor the dividend has the slightest relation to the reasonableness of rates, the quotient can have no relation to it.

One might as well divide the number of spikes in a railroad track by the number of cross-ties, and expect the quotient to show what are reasonable rates for each of the thirteen classes of traffic, between any two given points.

LIX.

The First Section Continued.

The "average receipts per ton per mile" of a road is of no value except to show the proportion which the high class traffic bears to the low class traffic of the road.

The tonnage and rates of a road remaining the same, its "average receipts per ton per mile" will increase as the pro-

portion which its high class traffic bears to its low class traffic, increases.

To demonstrate this fact mathematically, let us assume that the tonnage of any given road is equivalent to 2,000,000 tons carried one mile, in each of three consecutive years. During the first year, let us assume one-fourth of the tonnage to be class 1, and carried at 5 cents per ton; and three-fourths of the tonnage to be class A, and carried at 1 cent per ton. We would have:

500,000 tons of class 1 at 5 cents.....	$25,000
1,500,000 tons of class A at 1 cent.....	15,000
Or, 2,000,000 tons at 2 cents.....	$40,000

The " average receipts per ton per mile " for the first year, would be 2 cents.

During the second year, let us assume one-half of the tonnage to be class 1, and carried at 5 cents per ton; and the other half to be class A, and carried at 1 cent per ton. We would have:

1,000,000 tons of class 1 at 5 cents....	$50,000
1,000,000 tons of class A at 1 cent.....	10,000
Or, 2,000,000 tons at 3 cents.....	$60,000

The " average receipts per ton per mile " for the second year, would be 3 cents.

During the third year, let us assume three-fourths of the tonnage to be class 1, and carried at 5 cents per ton; and the remaining one-fourth to be class A, carried at 1 cent per ton. We would have:

1,500,000 tons of class 1 at 5 cents.....	$75,000
500,000 tons of class A at 1 cent.....	5,000
Or, 2,000,000 tons at 4 cents.....	$80,000

" The average receipts per ton per mile " for the third year, would be 4 cents.

We see that the tonnage remained the same, and the rates charged on classes 1 and A respectively remained the same during all three of the years, yet the "average receipts per ton per mile" for the third year was double what it was for the first year; and we see that it increased precisely as the proportion which the high class traffic bears to the low class traffic increased. But the demonstration does not throw any light whatever upon the reasonableness of the rates either on class 1 or class A.

So the fact that the rates charged on classified traffic from Cincinnati to local stations on the W. & A. R. R. pay more than "the average receipts per ton per mile" of that road only proves that the Cincinnati traffic is of a higher class than other classes of freight, in the carriage of which the W. & A. R. R. participates. The Court will judicially know, I suppose, that the grain traffic from the Northwest, via Atlanta, to the Carolinas, and to the coast, for domestic consumption, and for export, represents a vast tonnage of very low class freight; and that coal carried from North Georgia and East Tennessee, via Atlanta, to the Carolinas, and the coast, represents another vast tonnage of very low class freight. This vast tonnage of very low class freight necessarily makes the "average receipts per ton per mile" of the Western & Atlantic Railroad very small; but it does not prove that the rates charged by that road upon any class of freight are unreasonably high, or unreasonably low.

LXX.

The First Section Continued.

The "average receipts per ton per mile" of one road cannot be used as a standard of reasonableness for the rates of another road.

In the two last preceding sections of this argument, I have

shown that the "average receipts per ton per mile" of any particular road cannot be used as a standard of reasonableness for the rates of that road on any particular traffic; and *a fortiori*, it cannot be used as a standard of reasonableness for the rates of other roads.

Counsel for the appellant in his argument, in the court below, presented a table showing a comparison between the "average receipts per ton per mile" of a number of railroads; and among them were the New York, New Haven & Hartford Railroad, and the Norfolk & Western Railroad.

The "average receipts per ton per mile" of the former was very much higher than the "average receipts per ton per mile" of the latter. That fact demonstrates that the proportion which the high class traffic carried by the former bore to the low class traffic carried by it, was very much greater than the proportion which the high class traffic carried by the latter bore to the low class traffic carried by it. The fact is easily accounted for, when we remember that the New York, New Haven & Hartford Railroad is located in New England, and carries a large amount of dry goods, boots and shoes, and other high class traffic; while the Norfolk & Western Railroad is located in a mining country, and carries a large amount of low class mineral traffic. The disparity between the "average receipts per ton per mile" of those two roads, while it proves a corresponding disparity between the proportion of high class and low class traffic carried by them, respectively, has no tendency whatever to prove either that the rates charged by the New York, New Haven & Hartford Railroad on its high class traffic are too high, or that the rates charged by the Norfolk & Western Railroad on its low class traffic are too low.

LXXI.

The First Section Continued.

I have shown that the "average receipts per ton per mile" cannot be used as a criterion of the reasonableness of rates, because such "average receipts" has no relation whatever to the matter. But even if some such relation existed, it is self-evident that the value of a thing cannot be ascertained by applying, as a measure, the average value of a number of dissimilar things, which differ greatly in value as compared with each other, and as compared with the thing that is to be measured.

The "average receipts per ton per mile" represents the average received per ton per mile by a railroad for the transportation of hundreds of thousands or millions of shipments, made under varying conditions and circumstances. As stated above, some shipments consist of single packages, weighing, perhaps, less than one hundred pounds; some shipments are made in car load quantities; and some in train load quantities. Some of the freights are very light and bulky, and of considerable value per ton. Others consist of heavy, coarse articles, of comparatively small value per ton. Some shipments are made over short distances; others over long distances; and others the entire length of the road. The freight receipts per ton per mile necessarily vary within wide limits, from eight or even ten cents per ton per mile on first class freight carried over only a few miles of the road, to three and one-half mills per ton per mile, and even less, on long haul coal and mineral traffic.

No country merchant who keeps in his store a great variety of articles, differing greatly in value, would undertake to ascertain his "average receipts" per pound or per yard, and to sell all of his goods to his customers at a certain profit over and above his "average receipts." He would find plenty of customers for his dry goods, but none for his coffee and sugar.

LXXII.

The First Section Continued.

The official classification contains six classes, numbered from 1 to 6. Let us assume that the rates charged by a certain railroad, for a certain distance, on the several classes, are, in cents per 100 pounds, as follows:

On class 1.....6 cents
On class 2.....5 cents
On class 3.....4 cents
On class 4.....3 cents
On class 5.....2 cents
On class 6.....1 cent

The average of said rates is 3.5 cents. If the average of rates is to be taken as the standard of reasonableness, the rates on the first three classes would be too high, inasmuch as they exceed the average; and, in revising the tariff, the new rates would be as follows:

On class 1.....3.5 cents
On class 2.....3.5 cents
On class 3.....3.5 cents
On class 4.....3 cents
On class 5.....2 cents
On class 6.....1 cent

The average of those rates is 2.75 cents; and again using the average as a maximum, the second revision would stand as follows:

On class 1.....2.75 cents
On class 2.....2.75 cents
On class 3.....2.75 cents
On class 4.....2.75 cents

On class 5.....2 cents
On class 6.....1 cent

The average of those rates is 2.33 cents; and again using the average as a maximum, the third revision would stand as follows:

On class 1.....2.33 cents
On class 2.....2.33 cents
On class 3.....2.33 cents
On class 4.....2.33 cents
On class 5.....2 cents
On class 6.....1 cent

The average of those rates is 2.05 cents; and again using the average as a maximum, the fourth revision would stand as follows:

On class 1.....2.05 cents
On class 2.....2.05 cents
On class 3.....2.05 cents
On class 4.....2.05 cents
On class 5.....2 cents
On class 6.....1 cent

The average of those rates is 1.86 cents.

The foregoing illustrations are sufficient to demonstrate that if the average of rates is to be the standard of reasonableness, all rates above the average must be adjudged to be too high, and be reduced so as not to exceed the average; that at each revision the average is necessarily reduced; and that it requires only a certain number of revisions to reduce all of the rates to zero.

LXXIII.

The First Section Continued.

Counsel for the appellant with reference to the value of such data as "average receipts per ton per mile," etc., may quote the following extract from the cross-examination of J. M. Culp:

"Is not such data useful to some extent in determining whether an existing rate is or is not excessive?"

"Answer. It is useful in determining whether *all the rates* are excessive. In other words, the average receipts of a road per ton per mile might be so much that, taken in connection with other things, it might be held that the rates were excessive."

Trans. No. 69, p. 133.

Counsel's contention is that if such data is useful in determining whether *all* the rates are excessive, it must be useful in determining whether the rates on classified freight to the shorter distance points in these cases are excessive.

It would be equally logical to contend that if a certain factor, in connection with others, may enable us to solve a certain equation, the same factor, will, in the absence of the others, enable us to solve any part of the equation.

If you ask a gas company engaged in manufacturing gas for illuminating purposes, what it costs to produce a ton of coke, its reply must be that this depends on what the public will pay for the gas. And if you ask the company what it costs to produce a thousand cubic feet of gas, its reply must be that this depends on what the public will pay for the coke.

The working expenses of the whole operations of the company are so much. The result of those operations is the output of a certain quantity of gas, and a certain quantity of coke. But you cannot say what is a reasonable rate to be charged for the gas, until you know what rate the company can obtain for the coke; and you cannot say what is a reasonable rate to be charged for the coke, until you know what rate the company can obtain for the gas. If the company can obtain such rates for the gas as will enable it to approximate a fair return on its investment, it can afford to accept exceedingly low rates on the coke.

Now take, on the other hand, a coke company engaged in manufacturing coke for neighboring blast furnaces. It can use, in heating its coke ovens, a certain quantity of the gas which is produced in making the coke, but no more; and for the remainder of the gas produced, the company has probably no market at all. In this case, evidently, the coke must be looked to as the main reliance to earn a fair return on the investment, and the most that can be expected of the gas is that it shall help, in some slight degree, to lighten the burden.

In the case of a railroad company, the result of its operations *as a whole* is the transportation of a certain number of passengers, a certain quantity of mail and express matter, and a certain number of tons of freight; and to those operations, *as a whole*, it must look for a reasonable return upon the fair value of its investment.

What is denominated "local traffic" is affected by competition between product and product, and between "market and market," as shown in Section XLVIII. of this argument.

What is denominated "competitive traffic" is affected not only by competition between product and product, and between market and market, but also by competition between carrier and carrier.

In the case of one railroad company, only one-fourth of its traffic may be "local," and the remaining three-fourths "competitive;" while, in the case of another company, the proportions may be exactly reversed.

Whatever may be the proportion which the "competitive traffic" bears to the "local traffic" of a company, the company must, of necessity, accept such rates on its "competitive traffic" as its rivals may offer; and if the revenue derived from its "competitive traffic" fails to pay a reasonable return upon the value of the investment, the deficit must be made up by

increasing the rates on the "local traffic"—if it be possible. And if competition between product and product, or between market and market, prevents an increase in the rates on the "local traffic," the company must cease operations.

In the case of a railroad company, as in the cases of the gas company, and the coke company, referred to above, you must look to the operations of the company *as a whole,* and before you can decide whether the rates charged upon one source of revenue are reasonable, you must ascertain what amount can be realized by the company from its other sources of revenue.

We see, therefore, that while, as Mr. Culp says, such data as the "average receipts per ton per mile," etc., may, possibly, be useful in determining whether *"all the rates* are excessive;" it is of no value whatever in determining the reasonableness of rates charged on any particular portion of the traffic.

In Section LXIV. of this argument, I showed that in order to determine whether the rates of a railroad are reasonable *its operations as a whole* must be considered.

LXXIV.

The First Section Continued.

Counsel for the appellant, in his argument in the court below, referred to the fact that such data as "the average receipts per ton per mile" has been kept and recorded by the roads for their own use for a period long anterior to the passage of the Act to Regulate Commerce, and is still so kept and recorded; and he contended that such data has been kept by the roads for the purpose for which he seeks to use it in these cases; namely, to enable them to see whether their rates are too high or too low.

In the first place, the testimony does not show that all rail-

roads keep such data. On the contrary, a good many of them do not keep it at all.

Trans. No. 69, p. 133.

In the second place, such railroads as have kept such data, have done so (as we may infer) for purposes entirely foreign to the subject of rate construction.

Thus—"The average receipts per ton per mile" is of value in ascertaining the proportion which the high class traffic bears to the low class traffic of a road; so that if the average is found to be too low, the Traffic Manager may look around to see if he can increase the proportion of the high class traffic on his road, by soliciting additional traffic of that class.

So, such data as "the number of tons carried one mile" is of value for the purpose of giving those officers of the company, who are charged with scrutinizing its expenditures, a basis to compare the results of one month, with the corresponding month of the preceding year, and the results of one year with a preceding year, or years.

They are also of value in measuring the amount of work actually performed in the transportation of freight during a year; and in enabling railroad officers to ascertain, by comparison, the actual increase or decrease in the freight traffic.

The same may be said of such data as the "estimated cost of carrying one ton one mile," etc., etc., etc.,

Those railroads which have kept such data have never been able to use them in rate construction, for the simple reason that freight rates must be controlled by commercial laws affecting competition; and they cannot be fixed by arbitrary formulae.

No practical traffic manager has ever used any such data in the construction of a freight schedule; and no one else has ever attempted to do so, except the Interstate Commerce Commission.

LXXV.

The First Section Continued.

Counsel for appellant, in his argument in the court below, relied upon the "estimated cost of carrying one ton one mile," as one of the standards for measuring the reasonableness of rates.

The "estimated cost of carrying one ton one mile" on a road cannot be used as a standard of reasonableness for the rates of that road, on any particular traffic.

The "estimated cost of carrying one ton one mile" is ascertained by dividing the total expenses "assignable to the freight service" by the "number of tons carried one mile."

I have shown in Section LXVIII. of this argument how to ascertain the "number of tons carried one mile." But it has been found impracticable to invent any satisfactory method of determining what proportion of the total expenses of a railroad are properly "assignable to the freight service," as contra-distinguished from the passenger service; the mail service; the express service, etc.

The total expenses of a railroad company are made up by adding together the expenses of—

1. Maintenance of way and structures;
2. Maintenance of equipment;
3. Conducting transportation;
4. General expenses;
5. Fixed charges.

There are ten subdivisions of expenses classified under "Maintenance of way and structures."

There are nine subdivisions of expenses classified under "Maintenance of equipment."

There are twenty-seven subdivisions of expenses classified under "Conducting transportation."

There are seven subdivisions of expenses classified under "General expenses," and

Four subdivisions of expenses classified under "Fixed charges."

See Classification of Operating Expenses as prescribed by the Commission, taking effect July 1, 1894.

It appears from the Fourth Annual Report on the "Statistics of Railways in the United States" for the year ending June 30, 1891, pp. 392, 393 and 438, that the expenditures of all the railways of the United States, which made reports to the Commission, were as follows:

For Maintenance of Way and Structures	$153,671,576	
For Maintenance of Equipment	117,047,895	
For Conducting Transportation	384,385,458	
For General Expenses	75,926,707	
Operating Expenses, nine roads, "unclassified"	856,257	$ 731,887,893
Fixed Charges (p. 438)		326,886,541
Total Operating Expenses and Fixed Charges		$1,058,774,434

of which 65.31 per cent. is assignable to operation, and 34.69 per cent. is assignable to fixed charges.

In order to ascertain the "estimated cost of carrying one ton one mile," it is necessary to apportion the items of expense assignable to "operation" between the passenger, mail, and express service, on the one hand, and the freight service, on the other.

No rational basis for such an apportionment can be established in respect to a large number of those items.

For example: The expenses of repairs of roadway, repairs and renewals of bridges and culverts, repairs and renewals of fences, and repairs and renewals of telegraph, etc., etc., etc., have no known relation to the volume of passenger or freight traffic. Those expenses are not materially affected by the volume of traffic, either passenger or freight.

The above are only a few of many of the items that cannot be properly apportioned between the passenger and freight traffic.

The Commission having become convinced of the futility, not to say absurdity, of the attempt to apportion the expense between the freight and passenger service, no longer requires railroad companies to make such apportionment in their reports to the Commission. Such apportionment was required of the companies at the time these cases were heard before the Commission, and the Commission in its Report and Opinion in these cases, gives the "estimated cost of carrying one ton one mile" on the different roads involved. But since 1893 the Commission has not required the companies to make any such apportionment.

See Statistics of Railways, 1893, p. 81.

The reason why it is impossible to apportion with accuracy the cost of service among the items of traffic is thus stated by the Commission In Re Southern Ry. & S. S. Association, sometimes cited as In Re L. & N. R. R.:

"First of all, when it is undertaken, there must be an apportionment between the passenger traffic and the freight traffic; and if we suppose this to be made with reasonable accuracy, there must then be a like apportionment between the different kinds and classes of freight. Freight comes to a road in infinite variety; some heavy, some light, some in large packages, some in small, some perishable or of a special value and requiring peculiar accommodations and care; it is picked up in varying quantities at numerous stations, to be carried differing distances, some-

times on fast trains and sometimes on slow; the service is performed by men whose compensation differs, but the most of whom have something to do with all branches of the traffic, so that all assist in carrying it on over a road and by means of buildings, appliances, and equipment which have been provided for the whole. Any attempt to apportion the cost, therefore, would, at the best and under the most favorable circumstances, only reach an approximation. *This is so well understood, the world over, that the propositions which from time to time have been made in other countries to measure the charges of the carrier by the cost of carriage solely have always been abandoned after investigation.*"

1 Interstate Commerce Rep., p. 282, right col.

But if the cost could be ascertained, it could not be used as a rate-making factor. Upon this subject, the Commission says:

"On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded, because the charge for carriage would be greater than it could bear. On the other hand, the rates for the carriage of articles which, within small bulk or weight, concentrate great value, would, on that system of making them, be absurdly low; low when compared to the value of the article, and perhaps not less so when the comparison was with the value of the service in transporting them."

1 Ann. Rep., I. C. C. (1887), p. 30.

I have shown in Sections LXVIII. to LXXIV. of this argument that an arbitrary standard, such as the "average receipts

per ton per mile," cannot be used for fixing rates; and the same is equally true of the arbitrary standard styled the "estimated cost of carrying one ton one mile."

1 Ann. Rep., I. C. C. (1887), p. 30.

One of the chief errors into which the Commission has fallen in attempting to fix rates for carriers, as well as in attempting to judge of the rates fixed by carriers, is in supposing that rates can be constructed according to certain mathematical formulæ; that some kind of an equation can be invented, in which certain statistical data can be arranged as factors, and that by the solution of such equations it can be ascertained what are reasonable rates on any given article of freight, for any given distance, on any given railroad. Among the factors which it has attempted to use in constructing such equations have been the "average receipts per ton per mile;" the "estimated cost of carrying one ton one mile;" the "number of tons carried of freight earning revenue;" the "average distance haul of one ton;" the "freight earnings per train mile," etc. But neither one, nor all, of such factors can be used in the practical business of rate-making.

Rates of freight are subject to the commercial law of supply and demand. Competition between rail lines and water lines; competition between product and product; and competition between market and market are the factors which must govern railroad companies in the establishment of tariffs. No railroad freight tariff, not even a local freight tariff, can now be established arbitrarily by a railroad company. In fact, it cannot be said that railroad companies make their rates at all, at the present time. All that they can now do is to adjust them from time to time, to the surrounding conditions and circumstances as they may exist, and no regard can be paid to any kind of mathematical formulæ, or scientific theories.

In Texas & Pacific Ry. Co. vs. I. C. C., known as the "Import Case," this Court quotes from Wills, Judge, the following:

" I first observe that these are, in my judgment, eminently practical questions, and if this court once attempts the hopeless task of dealing with questions of this kind with any approach to *mathematical accuracy*, and tries to introduce a precision *which is unattainable in commercial and practical matters*, it would do infinite mischief and no good."

162 U. S., p. 225, T. & P. Ry. Co. vs. I. C. C.

This Court also quotes from Lord Herschell as follows:

" I quite agree with Mr. Justice Wills that it is impossible to exercise a jurisdiction, such as is conferred by this section, *by any process of mere mathematical or arithmetical calculation.* When you have a variety of circumstances, differing in the one case from the other, you cannot say that a difference of circumstances represents, or is equivalent to such a fraction of a penny difference of charge, in the one case, as compared with the other. A much broader view must be taken, and *it would be hopeless to attempt to decide a case by any attempted calculation.* I should say that the decision must be arrived at broadly and fairly, by looking at all the circumstances of the case, that is, looking at all the circumstances which are proper to be looked at, etc."

162 U. S., pp. 227, 228, T. & P. Ry. Co. vs. I. C. C.
73 Fed. Rep., p. 421, I. C. C. vs. L. & N. R. R.
74 Fed. Rep., p. 721, I. C. C. vs. Ala. Mid. Ry. Co. et al.

LXXVI.

The First Section Continued.

Counsel for the Commission, on cross-examination, asked several of the defendants' witnesses a series of questions, a sample of which is as follows:

"(37) Q. Are the rates from Cincinnati to Calhoun, Adairs-

ville, Cartersville, Acworth, and Marietta reasonable in and of themselves?

A. I think they are.

(38) Q. Are the lower rates from Cincinnati, through those intermediate points, and for the longer hauls through those points, to Atlanta, also, in your opinion, reasonable in and of themselves?

A. Yes, sir.

(39) Q. Is a rate reasonable in and of itself which does not yield the carrier a *proper remuneration* over and above *the cost of service of carriage?*

A. I should say not. If carried for less than cost, it would be unreasonably low."

Brown's Dep., Trans. No. 69, pp. 155, 156.
Biles' Dep., Trans. No. 69, p. 194.
Knox's Dep., Trans. No. 69, p. 183.
Lutz's Dep., Trans. No. 69, p. 164.
Culp's Dep., Trans. No. 69, p. 131.
van den Berg's Dep., Trans. No. 69, p. 122.
Winburn's Dep., Trans. No. 69, p. 171.

"(9) Q. Do the Atlanta rates yield the carriers revenue in excess of *the cost of the service of carriage?*

A. In my opinion, they do."

Lutz, Trans. No. 69, p. 164.
Winburn, Trans. No. 69, p. 171.
Biles, Trans. No. 69, p. 194.

Upon such testimony, counsel for the appellant argued in the court below that, if the Atlanta rates yield the carrier "a *proper* remuneration" over and above *"the cost of service of carriage,"* or *"the cost of transportation,"* and if those rates are reasonable in and of themselves, the higher rates charged to the shorter

distance points must yield the carrier an *excessive* "remuneration" over and above *"the cost of service of carriage,"* or *"the cost of transportation,"* and must, therefore, be unjust and unreasonable in and of themselves.

The argument, while plausible, is unsound. It assumes that there can be but two classes of rates, i. e., those which are "unreasonably low" and those which are "unreasonably high;" and that every rate must take one or the other of those classifications. It might as well be said that if the ocean is not at low tide, it must be at high tide; or it might as well be said that if the water in a river is not low it must be high. In speaking of tides, we have "high tide," "low tide," "mean tide," "spring tide," "neap tide," etc., with various gradations between them. So, in speaking of the stage of water in a river, we have "extreme high water," "low water," "extreme low water," etc.; and between "extreme high water," and "extreme low water," there are as many gradations as there are fractions of an inch in the difference between the two. So a rate may be "high," "higher," or "very high;" or it may be "low," "lower," or "very low." It may be "low" without being *"unreasonably* low," or it may be "high" without being *"unreasonably* high."

The argument also assumes that "a *proper* or *sufficient* remuneration over and above *the cost of service of carriage,"* or *"the cost of transportation,"* must refer to some *definite, fixed* per cent. of remuneration; and that any remuneration over or under that *fixed* per cent. must necessarily be *im*proper or excessive. But the phrase *"proper* or sufficient remuneration" is as flexible as the phrases "reasonable rate," "high tide," "low tide," "high water," "low water," etc.

Though a merchant may realize a "proper or *sufficient* remuneration" over and above the cost of a handkerchief when he sells it for 25 cents, it by no means follows that he would realize an *im*proper or excessive "remuneration" if he should

sell its duplicate for 30 cents; so, though a farmer may realize a "*proper* or *sufficient* remuneration" over and above the cost of raising cotton when he sells a part of his crop at 7 cents per pound, it by no means follows that he would realize an *im*proper or excessive "remuneration" if he should sell the remainder of his crop at 9 cents per pound.

So, though the carriers in these cases may realize "a *proper* or *sufficient* remuneration over and above *the cost of the service of carriage*" or "*the cost of transportation*" from the rates charged to Atlanta or Opelika; and though they may realize a somewhat greater "remuneration over and above *the cost of the service of carriage*" or "*the cost of transportation*" from the rates which they charge to the shorter distance points; the remuneration realized from the latter may be as "proper" as that which is realized from the former.

Mr. Winburn, in answer to a question whether, in his opinion, a rate is a reasonable rate "which does not give the carrier a proper remuneration over and above *the cost of service of the carriage,*" answers as follows:

"That depends on what we call a *proper* remuneration above *the cost of the carriage.* It seems to me there are a great many cases where a rate would be reasonable if it was above the *cost of carriage* to *any extent,* dependent largely upon the movement of traffic in different directions."

Trans. No. 69, p. 171.

Mr. Culp said: "In my opinion a road is always justified in taking additional traffic, or traffic which it otherwise could not get, to the extent of making a rate as low as *the actual movement expense incurred in the movement of that traffic.*"

Trans. No. 69, p. 131.

Mr. van den Berg said "where freight pays the *additional expense in hauling it,* it is no burden upon any other traffic."

Trans. No. 69, p. 123.

Mr. Lutz said: "There are times when we accept certain freight that we would not accept at other times. I will take the local freight (train), for instance, that will run between Atlanta and West Point. That train has got to run. We have got to pay the engineer and we have got to pay the crew; and by adding on probably one or two more cars, or something of that kind, it probably would not add to the cost of the train but very little more."

Trans. No. 69, p. 164.

The phrase "the cost of service of carriage," and the phrase *"cost of transportation,"* as used by the witnesses, refer to the *"cost of movement* of the *particular traffic;"* and they do not include *"the fixed charges* of the road."

This is illustrated by the following extract from the cross-examination of Mr. van den Berg, in case No. 69:

"Q. 2. If a given rate to a given point does not pay *operating expenses and also something on the dividend and fixed charges,* would not a part of the burden of paying those dividends and fixed charges, which ought to be borne by the traffic to that point, have to be borne by the traffic to other points?"

"A. I think not. Where freight pays *the additional expense in handling it,* it is no burden upon other traffic."

Trans. No. 69, p. 122.

The distinction between *"the cost of movement* of the particular traffic," and the "whole cost of operation," which includes *"the fixed charges* of the road," as well as the "operating expenses," is thus stated by the Commission in its First Annual Report, in commenting upon rates on long haul traffic: "By this, however, is meant only *the cost of movement of the particular traffic,* leaving out of view the *fixed charges of the road,* which must, in any event, be provided for, whether the long haul traffic is or is not taken. This distinction between *the cost*

of movement and *the fixed charges* often becomes of importance in such cases as that of the lumber trade just mentioned. . . . The *fixed charges of the road* may, for the purpose of illustration, be assumed to equal one-half of the whole (cost of operation), *the cost of movement* of freight the other half. The rates *made* were doubtless calculated to cover the whole (cost of operation), with a margin for profit, and were so laid that all traffic would contribute toward both *fixed charges* and *cost of movement*. But now comes this new business, and, from the nature of the case, low rates are a necessity to it; it can pay perhaps little, if anything, more than half what is paid by other traffic. But taking it will not increase perceptibly the *fixed charges* of the road, because those are made up of items that must be paid, whether the traffic is large or small. What is added to the cost by taking it (the traffic) is simply the expense *of its own handling and movement;* and, upon the supposition made, there might perhaps be gain to the road, instead of loss, in taking it at anything above half the rates which are levied upon other traffic corresponding to it in classification. It might, therefore, be carried at such rates without wrong to any one."

1 Annual Rep., I. C. C. (1887), p. 73.

To the same effect is the testimony of Mr. Culp, who said: "Now, there may be average cost, or estimated cost, *including fixed charges;* there is the cost which leaves out the fixed charges and takes (in) all other kinds of expense; then there is *a cost which pertains simply to the movement of a particular business*, (i. e.) a cost which is incurred only because that particular business is moved."

Trans. No. 69, p. 131.

When the witnesses say that the Atlanta rates "yield the carrier a proper or sufficient remuneration over and above *the cost of the service of carriage*," or "*the cost of transportation*," they use those phrases as equivalent to the phrase "cost of movement;" which does not include "the fixed charges of the road."

It is manifest, however, that though the Atlanta or Opelika rates may pay a proper or sufficient remuneration over and above *"the cost of movement,"* the carriers would be justified in increasing them until they would also pay a proper remuneration over and above *"the fixed charges;"* and they would doubtless do so, if competition at Atlanta and Opelika would permit.

LXXVII.

The First Section Continued.

Counsel for appellant, in the court below, vigorously attacked what are known as "combination rates." Such rates are described by Commissioner Walker as follows:

"The rates to local points are made by adding to the competitive rates at the nearest competitive point, the local rate from that point."

1 I. C. Rep., p. 635, Harwell vs. C. & W. R. R.

I have heretofore explained, in Sections XXIII., XXV. and XXVII. of this argument, how the "combination rates" are made to the shorter distance points involved in these cases.

It will be remembered that the "combination rates" on the Western & Atlantic Railroad are made by adding to the competitive rates which prevail from Cincinnati to Chattanooga, the local rates of the W. & A. R. R., from Chattanooga to destination; and that those local rates are from 10 to 50 per cent. less, as a general rule, than the local rates charged for similar distances on any other road in Georgia, except the Rome Railroad, and the Georgia Railroad.

It will be remembered that the "combination rates" on the Georgia Railroad are made by adding to the competitive rates which prevail from New York to Augusta, or from New York to

Atlanta, the local rates of the Georgia Railroad from Augusta or Atlanta to destination; selecting Augusta, or Atlanta, as the basing point, according as the one or the other gives the lowest total through rate to destination.

Persons living at local stations on the Georgia Railroad have the choice between the low competitive rates prevailing from New York to Augusta and Atlanta, respectively; and they are charged in addition thereto only such local rates as are fixed by the Georgia Railroad Commission, which rates are, as a general rule, from 10 to 50 per cent. less than those charged by any other railroad in Georgia, except the Rome Railroad, and the Western & Atlantic Railroad.

It will be remembered that the "combination rates" on the Atlanta & West Point Railroad to Grantville, Hogansville and LaGrange, are made by adding to the competitive rates which prevail from New York to Atlanta, the local rates of the A. & W. P. Railroad from Atlanta to those stations; that the combination rates on the first six classes to West Point are made by adding to the competitive rates which prevail from New York to Opelika the local rates of the A. & W. P. Railroad from Opelika to West Point, because that gives a lower combination than to base them upon Atlanta; and that the rates from New York to Newnan are less than would be made by combining either upon Atlanta or Opelika.

It will be noticed that the shorter distance points have the advantage of all the competition that exists at the nearest competitive point; that they are only charged in addition thereto such local rates as the Georgia Railroad Commission may fix as reasonable from the competitive point to destination; and that said Commission is organized under a law which provides that no member of the Commission shall be in any way interested in a railroad.

As an illustration of the principle upon which the combination rates in these cases are made, the rate on first class from Cincinnati to Acworth is $1.24 per 100 pounds. It is made up of the low competitive rate from Cincinnati to Chattanooga of 76 cents, and a local rate, as fixed by the Georgia Railroad Commission, from Chattanooga to Acworth of 48 cents, making a total of $1.24.

There is no complaint that the rate of 76 cents per 100 pounds, from Cincinnati to Chattanooga, is unreasonably high; and, as it is the result of severe competition, the presumption is that it is very low.

There is no complaint that the rate of 48 cents from Chattanooga to Acworth is unreasonably high for a shipment originating at Chattanooga; and, as it is a rate fixed by the Georgia Railroad Commission, the presumption is that it is very low.

It would seem that a combination of two rates, each of which is just and reasonable for the distance covered by it, would result in an aggregate rate that is just and reasonable for the sum of those distances.

88 Fed. Rep., p. 194, I. C. C. vs. W. & A. R. R. Co.

Similar rates were attacked in the Alabama Midland Case, and were sustained by the courts in that case.

74 Fed. Rep., p. 717, I. C. C. vs. Ala. Midland Ry. Co.

If the aggregate rate from Cincinnati to Acworth is to be reduced on first class freight from $1.24 to $1.07 per hundred pounds, which amounts to a reduction of 17 cents, the question arises as to whether the reduction shall be made north of Chattanooga, or south of Chattanooga. If the reduction should be made north of Chattanooga it would reduce the first class rate from Cincinnati to Chattanooga from 76 cents to 59 cents, and as the present rates from Cincinnati to Chattanooga are very low, it would seem unjust to compel any further reduction of them,

If it be said that the reduction should be made between Chattanooga and Acworth, then, as the present rates from Chattanooga to Acworth are very low, it would seem unjust to compel any further reduction of them.

LXXVIII.

The First Section Continued.

In the case of A. T. & S. F. R. R. vs. D. & N. O. R. R., 110 U. S., p. 684, this Court held that at Common Law a railroad company is not bound to carry beyond its own line; and it has been repeatedly held at Circuit that there is nothing in the Act to Regulate Commerce to compel connecting railroads to form through rates, or to join in making through rates.

37 Fed. Rep., 572, K. & I. Bridge Co. vs. L. & N. R. R. Co.

41 Fed. Rep., 563, L. R. & M. R. Co. vs. St. L., I. M. & S. Ry. Co.

51 Fed. Rep., 474, 475, O. S. L. & U. N. Ry. Co. vs. N. P. R. Co.

52 Fed. Rep., 915, C. & N. W. Ry. Co. vs. Osborne.

59 Fed. Rep., 402, 403, L. R. & M. R. Co. vs. St. L., I. M. & S. Ry. Co.

63 Fed. Rep., 778, 779, L. R. & M. R. Co. vs. St. L. & S. W. Ry. Co.

65 Fed. Rep., 41, St. Louis Drayage Co. vs. L. & N. R. R. Co.

86 Fed. Rep., 419, Gulf C. & S. F. Ry. Co. vs. Miami S. S. Co.

88 Fed. Rep., 662, Southern Indiana Exp. Co. vs. U. S. Exp. Co.

93 Fed. Rep., p. 92, I. C. C. vs. W. & A. R. R. Co., et al.

To illustrate: The Western & Atlantic Railroad is under no legal obligation to make joint through rates with the lines north of Chattanooga. It has a perfect right to refuse to recognize any through bill of lading that may be issued by lines north of Chattanooga for the transportation of freight from Cincinnati or other Ohio River points to local stations on its line.

When freight is shipped from Cincinnati, consigned to a local station on the W. & A. R. R., it is bound to receive it at Chattanooga; carry it to the local station; and there deliver it to the consignee; but the W. & A. R. R. has the perfect right to charge on such freight its full reasonable local rate from Chattanooga to such local station.

110 U. S., 684, A., T. & S. F. R. R. vs. D. & N. O. R. R.

The service which is rendered by the W. & A. R. R. in the transportation of freight shipped from Cincinnati, consigned to one of its local stations is, so far as mere service is concerned, substantially the same as that rendered by it in the transportation of freight which originates at Chattanooga, consigned to such local station. If the freight be shipped from Cincinnati, the W. & A. R. R. receives it from one of the roads north of Chattanooga; while if the freight originates at Chattanooga, it receives it from the consignee; and in either case it carries the freight to its local station on the same train, and delivers it to the consignee.

The mere service rendered by it being substantially the same, it has the right to charge the same rate whether the freight be shipped from Cincinnati, or originates at Chattanooga.

If the Western & Atlantic Railroad sees proper to recognize through bills of lading issued by the roads north of Chattanooga, and to make joint through rates with those roads from Cincinnati to Acworth, and other local stations on the Western & Atlantic

Railroad, it is a purely voluntary act on its part, and it can withdraw from the arrangement whenever it sees proper to do so.

If the Western & Atlantic Railroad should refuse to-morrow to recognize through bills of lading issued by the roads north of Chattanooga, and refuse to make joint through rates with those roads, persons who live at local stations on the line of the Western & Atlantic Railroad would have to pay the rate from Cincinnati to Chattanooga, and, in addition thereto, the local rates of the Western & Atlantic Railroad from Chattanooga to destination. In other words, they would have to pay as high, if not higher, rates than they now pay; and they would be deprived of the convenience of through bills of lading, and through rates.

The mere fact that the Western & Atlantic Railroad and the roads north of Chattanooga have endeavored to accommodate the shipping public at the local stations on the line of the W. & A. R. R. by joining in through rates, and recognizing through bills of lading, which the public have no right to require as matter of law, furnishes no reason for adjudging the through rates to be unreasonably high, merely because they are made by combining the reasonable rates which those roads would have respectively charged, if such through rates had not been agreed upon, and such through bills of lading had not been recognized. If the rates charged by those roads for transportation over their respective lines were just and reasonable before they were combined into through rates, the through rates which result from such combination must themselves be just and reasonable.

Any other view of the question will force the railroads of this country to abandon the system of through rates and through bills of lading, in order to be allowed to charge their own reasonable rates.

Such a course would not result in any decrease in the rates between different points.

On the contrary, it would result in an increase of charge; because it would force the carriers to return to the mode of doing business which prevailed before the present system of through rates and through bills of lading was adopted. In former times, a person doing business at Cincinnati, who wished to ship to Acworth, Ga., would consign the shipment in the care of a commission merchant at Chattanooga. The total charges on such a shipment would be made up, for instance, of the rate of 76 cents per 100 pounds on first class freight from Cincinnati to Chattanooga; the commission merchant's factorage charge at Chattanooga; and the local rate of the Western & Atlantic Railroad of 48 cents from Chattanooga to Acworth. In a word, the total charge would exceed the present combination rate, by the amount of the commission merchant's factorage charge at Chattanooga; and the shipping public would be deprived of the convenience of through rates, and through bills of lading.

LXXIX.

The First Section Continued.

Combination rates are not peculiar to the South.

In its eleventh annual report the Commission says:

"We have before us at the present time a complaint which alleges that the rate from Chicago, Ill., to Kearney, Neb., is discriminating and unlawful. The rate is made in this way: There is an interstate rate from Chicago to Omaha. The rate from Omaha to Kearney is fixed by the Railroad Commission of the State of Nebraska. The through rate from Chicago to Kearney is made by adding to the through rate to Omaha, the local rate from Omaha to Kearney. Merchandise is transported by continuous shipment upon through bills of lading from Chicago to Kearney at this rate." . . . "We might order a

reduction of the whole rate, *but we could not determine how that reduction should be shared by the different carriers.* If the carriers refuse to agree about that, *it is difficult to see how the order could be enforced.* Clearly, *to make and enforce such an order we must have power to determine the divisions of this through rate between the different roads making up the joint line.*

"KEARNEY IS BUT ONE OF THOUSANDS OF PLACES TO WHICH THE THROUGH RATE IS MADE UPON THIS SAME PLAN. A large part of interstate rates are joint rates, in reference to which the same thing would be true."

11 Ann. Rep., I. C. C. (1897), p. 27.

It will be noticed that "combination rates" are by no means peculiar to the South. If Cincinnati be substituted for Chicago, Chattanooga be substituted for Omaha, and Acworth be substituted for Kearney, the analogy between the cases at bar and the case referred to by the Commission is obvious. And as the Commission conceded its inability to relieve the difficulty in that case, I do not see how this Court can be expected to do it in these cases.

LXXX.

The First Section Continued.

There are three principles upon which combination rates are made.

First: That all rates should increase with the distance, if competition will permit.

Second: That where competition conflicts with distance, competition must control.

Third: That those cities, which by reason of their strategetical position can command competitive rates, are entitled to the advantage of their location.

The appellant not only concedes that all rates should be constructed according to distance, but it insists that where distance and competition conflict, distance should control; and that railroad companies have no right to recognize the strategetical advantages, which competitive places enjoy, unless the railroads reduce all of their non-competitive rates to the level of their competitive rates.

Suppose the line A-B-C to represent a railroad. The appellees and the appellant agree that in the absence of competition, the rates from A to C should be higher than the rates from A to B; because, the distance from A to C is greater than the distance from to A to B.

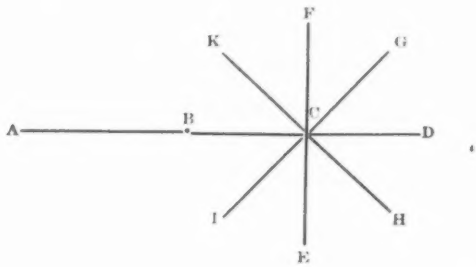
If C is a city, whose strategetical position is such as to enable it to command competitive rates, which are less than might reasonably be charged from A to C, in the absence of competition, the appellees contend that they have the right to accept the competitive rates prevailing at C, provided they yield something more than the additional cost of moving that traffic; and that the fact that they accept such rates at C, as competition at that place may force them to accept, furnishes no reason why they should be compelled to accept as low rates at B, where no competition whatever exists.

On the other hand, the appellant contends that notwithstanding competition at C may compel the appellees to accept less rates from A to C, than might reasonably be charged in the absence of competition, they shall not do so, unless they accept equally low rates at B, though there may be no competition whatever at that point.

According to the contention of the appellant, a railroad in accepting lower rates to a competitive point than might otherwise be reasonably charged, must do so under penalty of reducing all of its intermediate, non-competitive rates to the level of the competitive rates beyond.

As there is no competition at B, the appellees contend that rates from A to B should be constructed according to distance, *i. e.*, that the charge should be reasonable, considering the length of the haul. It may be, however, that the competitive rates from A to C are so low, and B may be located so near to C, that a merchant living at B would find it to his interest to pay rates which are equal to the competitive rates from A to C, added to the local rates from C to B, rather than pay the rates from A to B constructed upon a distance basis. By that plan, he would get precisely the same benefit of the competition which exists at C as though he were doing business at C; and he would only pay, in addition thereto, rates equal to reasonable local rates from C to B.

In other words, the merchant rather than pay the rates from A to B, constructed upon a distance basis, *would himself use a combination rate* by having his goods shipped from A to C, under the competitive rates, and from C back to B, under the local rates. A railroad owning the line from A to C, and knowing that a merchant at B can avail himself of a combination of rates such as I have just referred to, accepts rates, which are not higher than can be obtained by such a combination, and saves the merchant at B the trouble and delay of shipping his goods from A to C, and thence back to B. In other words, the railroad gives to the merchant at B, although it is a non-competitive point, all the benefit of the competition that exists at C; and instead of requiring him to ship his goods to C, and thence back to B, it delivers them to him direct at B; and at a rate less than the rate from A to B would be, if constructed upon a distance basis.



In the diagram first set forth in this section, I have supposed that the non-competitive point B is located between A, and the competitive point C. It is manifest, however, that the non-competitive point may be located beyond the competitive point C; as, for instance, at the point D, or E, or F, or G, or H, or I, or K. It is wholly immaterial whether the non-competitive point be located between A and C, or beyond C. The non-competitive point gets all that it is entitled to, when it is allowed the full benefit of the competition that exists at C, and is only required to pay, in addition to the competitive rates prevailing at C, rates equal to reasonably low local rates from C to destination.

In this case, the local rates from Atlanta or Opelika to the shorter distance points are reasonably low.

The appellees as well as the appellant agree that non-competitive points should have all the benefit of such competition as may exist at the nearest competitive point. The precise point of difference between the appellees and the appellant is, that the appellant contends that the non-competitive points shall have the same rates *as if they were located exactly where the competitive point is located;* while the appellees contend that the non-competitive points should pay in addition, rates equal to reasonably low local rates from the competitive point, to destination.

In case No. 69, the shorter distance points are certain non-

competitive stations on the Western & Atlantic Railroad between Chattanooga and Atlanta; and their complaint is that on freight from Cincinnati, Atlanta, which is a longer distance point, is charged less than they are.

In case No. 68, the shorter distance points are certain non-competitive stations on the Georgia Railroad between Augusta and Atlanta; and their complaint is that on freight from New York, Atlanta, which is a longer distance point, is charged less than they are.

In case No. 70, the shorter distance points are certain non-competitive stations on the Atlanta & West Point R. R. between Atlanta and Opelika; and their complaint is that on freights from New York, Opelika, which is a longer distance point, is charged less than they are.

It will be seen that the shorter distance points in all three of the cases are located between the point of shipment (A) and the competitive point (C), and, therefore, that their location corresponds with the non-competitive point (B) in both of the diagrams above set forth in this section.

In all three of the cases the appellees would be perfectly willing to construct their rates from Cincinnati or New York to the shorter distance points, according to distance; for such rates would be materially higher than those now charged.

But the competition at Atlanta and Opelika, taken in connection with the rates fixed by the Georgia Railroad Commission, compels the appellees to accept rates from Cincinnati and New York to the shorter distance points, which are materially lower than they would be if they were constructed according to distance. The appellees have been forced to give to the shorter distance points the full benefit of the competition which exists at

Atlanta and Opelika. But the shorter distance points are not willing to have their rates from Cincinnati and New York constructed according to distance, nor are they content with receiving the benefit of the competition which exists at Atlanta and Opelika. What they demand is, that they shall have precisely the same rates as if they were located exactly at Atlanta or Opelika; and they refuse to pay anything whatever in addition to the Atlanta or Opelika rates.

If it be held that railroads cannot accept rates which competition forces upon them at such points as Atlanta and Opelika, except at the peril of reducing their rates at intermediate non-competitive stations to the same level, its manifest tendency will be to deter railroad companies from engaging in competition; and it will have more effect toward stifling railroad competition, than any contract, combination or conspiracy denounced by the anti-trust Act of Congress.

In the cases at bar, the Court of Appeals said:

"Therefore, in fixing the rates to these intermediate points, the through rate to that competitive point, which, combined wih the local rate from the competitive point to the point of destination, will give the lowest through rate to the non-competitive point, controls. As the non-competitive point thus gets the benefit of the lowest rate to any of the neighboring competitive points; and as the carriage of the competitive traffic to the respective competitive points is remunerating to the carriers to an extent that more than pays the expense of moving the competitive traffic, it is difficult to perceive how the non-competitive points are subject to any undue or unreasonable prejudice or disadvantage by this scheme of rate making."

93 Fed. Rep., p. 92, I. C. C. vs. W. & A. R. R. Co. et al.

LXXXI.

The First Section Continued.

There were a number of combination rates in the Alabama Midland case, which the Commission declared to be illegal; but the Commission was reversed by the Circuit Court, by the Circuit Court of Appeals, and by this Court.

In that case, Montgomery was the competitive point, and Troy the non-competitive point.

1. On cotton shipped from Troy to New Orleans, there was a combination rate, equal to a rate made by adding the local rate from Troy to Montgomery, to the competitive rate from Montgomery to New Orleans.

2. On class goods shipped from Ohio River points to Troy, there was a combination rate, equal to a rate made by adding to the competitive rate from the Ohio River to Montgomery, the local rate from Montgomery to Troy. Those rates were made precisely like the rates in case No. 69 at bar are made. The combination rates in case No. 69 are made by adding to the competitive rates from Cincinnati to Chattanooga, the local rates from Chattanooga to the shorter distance points on the W. & A. R. R.

3. On class goods shipped from New York, over the Alabama Midland Railway to Troy, there was a combination rate, equal to a rate made by adding to the competitive rate from New York to Montgomery, the local rate from Montgomery back to Troy.

Those rates were made precisely like the rates in cases Nos. 68 and 70 at bar are made. The combination rates in case 68 are made by adding to the competitive rates from New York to Atlanta, the local rates from Atlanta back to certain shorter distance points on the Georgia Railroad; and in case No. 70 the

combination rates are made by adding to the competitive rates from New York to Opelika, the local rates from Opelika back to certain shorter distance points on the Atlanta and West Point Railroad.

4 I. C. Rep., p. 348, Board of Trade of Troy vs. Alabama Midland Ry. Co.

69 Fed. Rep., p. 227, I. C. C. vs. Alabama Midland Ry. Co.

74 Fed. Rep., p. 715, I. C. C. vs. Alabama Midland Ry. Co.

168 U. S., p. 144, I. C. C. vs. Alabama Midland Ry. Co.

LXXXII.

The First Section Continued.

There was a combination rate in the Behlmer case, which the Commission declared to be illegal; but the Commission was reversed by the Circuit Court, and by this Court.

In that case, Charleston was the competitive point, and Summerville the non-competitive point.

On hay, and other articles of interstate commerce, shipped from Memphis to Summerville, there was a combination rate, equal to a rate made by adding to the competitive rate from Memphis to Charleston, the local rate from Charleston back to Summerville.

The combination rate in that case was made precisely like the rates in cases Nos. 68 and 69, at bar.

175 U. S., 648-650, Louisville, etc., R. R. vs. Behlmer.

LXXXIII.

The First Section Continued.

In the Circuit Court, counsel for appellant referred to what is known as the "Social Circle Case," as holding that "combination rates" are unreasonable.

In the "Social Circle" case, it was held that where two or more roads join in making combination through rates on interstate traffic, such roads constitute but one "line;" and that such "line" is subject to the Act to Regulate Commerce, though one of the roads may be wholly within a single State. But it was not even intimated in that case, that a "combination rate" charged by such a line to a local station on one of the roads constituting the line, is unreasonable, merely because the delivering road is allowed its local rate as its proportion of the joint through rate.

162 U. S., pp. 184, 191, 192, C., N. O. & T. P. Ry. vs. I. C. C.

175 U. S., pp. 662, 672, 673, Louisville, etc., R. R. Co. vs. Behlmer.

The Social Circle case was cited by counsel for the Commission in his argument in this Court in the Alabama Midland case; and in the same argument he contended that a combination rate made up in part of a local rate is unreasonable.

See Hon. L. A. Shaver's Brief, p. 39, in I. C. C. vs. Ala. Midland Ry. Co., No. 563, Oct. Term, 1896.

The Social Circle case was also cited by counsel for Behlmer in his argument in this Court in the Behlmer case; and in the same argument he also contended that a combination rate made up in part of a local rate is unreasonable, and unjust.

See Hon. C. B. Northrop's Brief, p. 87, in Louisville, etc., R. R. Co. vs. Behlmer, No. 244, Oct. Term, 1898.

If this Court had regarded the Social Circle case as deciding that a combination rate which is made up in part of a local rate is unreasonable, its decisions in the Alabama Midland case, and the Behlmer case, would have been just the reverse of what they were.

LXXXIV.

The First Section Continued.

Counsel for appellant, in the court below, referred to the Augusta Southern Railroad case, 74 Fed. Rep., p. 527.

The legality of "combination rates" was not discussed by the Court in that case. The Wrightsville & Tennille Railroad, which was one of the roads involved in that case, was not the delivering carrier. It was an intermediate carrier, and its service was, in the strictest sense, "through" service. It received the cars at one end of its line, and surrendered them at the other end; without incurring any of the expense or delay incident to delivery at local stations.

My information is that the rate discussed by the Court in that case was on phosphate from Charleston, via Augusta, and Tennille, to Oconee River landings.

The total rate was.....		$4 20
It was divided as follows:		
To the roads running from Charleston to Tennille, 326 miles (5½ mills per mile).....	$1 80	
To the Wrightsville & Tennille Railroad, 36 miles (22 mills per mile).....	80	
To the boats on the Oconee River.....	1 60	—$4 20
The proportion of the Wrightsville & Tennille Railroad, added to that of the boats, amounted to	2 40	

The Wrightsville & Tennille Railroad had for a long period of time joined with the Augusta Southern Railroad, as well as with the Central Railroad, in making through rates on phosphate; and it had accepted from each of them 80 cents as its reasonable proportion of the through rate.

Its local rate from Wrightsville to Tennille was $1.16. It withdrew from its connection with the Augusta Southern Railroad, and proposed to charge the Augusta Southern its local rate of $1.16, which, added to the boat's proportion of $1.60, made the total proportion from Tennille to the Oconee River landings $2.76, instead of $2.40, as it had previously been. The Court held that as $2.40 had been previously accepted from the Augusta Southern Railroad as reasonable, and as it was still accepted from the Central Railroad as reasonable, the presumption was that the increased rate of $2.76 was unreasonable as a charge against the Augusta Southern Railroad—especially as the former charge of $2.40 was continued to be accepted from the Central Railroad.

The question in that case was as to the right of a railroad to discriminate between two of its connections as to the proportion which it would demand out of a through rate. *There was no question as to whether the through rate was reasonable as between the through line and a shipper.*

In the case at bar, counsel contends that the Western & Atlantic Railroad, the Georgia Railroad, and the Atlanta & West Point Railroad, respectively, shall be compelled to accept substantially the same rate per ton per mile on their short hauls from Chattanooga, Augusta, and Atlanta, respectively, to their respective local stations, as competition forces the through line to accept on the long haul from Cincinnati and New York, respectively, to Chattanooga and Atlanta, respectively; but in the Augusta Southern case, the Court allowed the Wrightsville &

Tennille Railroad to continue to charge its former rate of 80 cents for 36 miles, which rate was four times as much per ton per mile as was charged by the connecting roads from Charleston to Tennille; and the only effect of the order in that case was to prohibit the Wrightsville & Tennille Railroad from increasing its proportion from 80 cents to $1.16, as against the Augusta Southern Railroad, while it continued to accept 80 cents from the Central Railroad.

The "Augusta Southern" case was cited by counsel for the Commission, in his argument in the Court of Appeals in the cases at bar, as holding that combination rates are unreasonable and unlawful. Judge Pardee participated in the decision of the "Augusta Southern" case, and of course was familiar with what was held in that case; and that he did not consider the "Augusta Southern" case as holding that combination rates are unreasonable, is evident from his concurring in the opinion in the cases at bar.

LXXXV.

The First Section Continued.

In the case of I. C. C. vs. E. T., V. & G. Ry. Co. et al., Judge Severens said:

"Nevertheless, a reference to the Memphis rate is of value in determining whether the rates to Chattanooga are reasonable rates, it appearing that, though the distance is nearly one third greater than to Chattanooga from the East, rates are accepted for the Memphis business considerably less than those at Chattanooga."

85 Fed. Rep., pp. 111, 112.

In that case, Memphis was one of the longer distance points, and Chattanooga was the shorter distance point. The Commis-

sion held that as there was water competition at Memphis, which created dissimilar circumstances and conditions, the lower rates to Memphis were not violative of the fourth section, and refused relief to Chattanooga, so far as Memphis was concerned. According to Judge Severens, however, though the Commission declined to grant relief under the fourth section, it could have used the Memphis rates as presumptive evidence that the shorter distance rates to Chattanooga are unreasonable, and could have granted relief to Chattanooga under the first section.

In the case of A. T. & S. F. R. R. vs. D. & N. O. R. R., 110 U. S., p. 684, this Court refused to use through rates as presumptive evidence that local rates were unreasonably high.

If Judge Severens is right, there is no use for either the second, third or fourth sections of the Act; because every long and short haul case can be disposed of under the first section. If a disparity of rates constitutes an unjust discrimination, then, according to Judge Severens, the higher rate is unreasonable; and dispensing with the second section, relief may be given under the first section. So, if a disparity of rates constitutes an undue prejudice, then, according to Judge Severens, the higher rate is unreasonable; and dispensing with the third section, relief may be given under the first section. And so, if a greater charge be made for a shorter than for a longer distance, then, according to Judge Severens, the shorter distance rate is unreasonable; and dispensing with the fourth section, relief can be given under the first section.

But according to Mr. Justice Brown:

"A charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination, or an unreasonable preference, under sections 2 and 3." And he might have added, with equal propriety, may create a greater charge for a shorter than for a longer distance, under such circumstances as to violate section 4.

According to Mr. Justice Brown, the first section of the Act has a scope of its own, and covers a ground entirely distinct from that covered by either section 2 or section 3; and, I may add, entirely distinct from that covered by section 4.

Again, Judge Severens said:

"I think the question of the justness and reasonableness of rates under the first section is colored by the other provisions of the law and by the general policy of the whole enactment, which is to effect the equality of charges."

85 Fed. Rep., p. 114.

In Section XLVI. of this argument I have shown that neither the common law, nor the Act to Regulate Commerce, requires "equality of charges," except where the services are similar; and therefore I submit that Judge Severens is in error in referring to "the general policy" of the Act as aiming at the "equality of charges." I also submit that he is in error in holding that "the first section is colored by the other provisions of the law;" for, as stated above, Mr. Justice Brown holds that the first section has a scope of its own, which is distinct from that of any of the other provisions of the law. Again, in the case of I. C. C. vs. E. T., V. & G. Ry. Co. et al., Judge Severens said:

"The question whether the rates are just and reasonable in themselves is in some measure a relative one, that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a *similar* service," etc.

85 Fed. Rep., p. 114.

I agree to that proposition, provided due importance be given to the word "similar."

Again Judge Severens says:

"It seems to me clear, that the charges accepted for the longer

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haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul."

85 Fed. Rep., p. 114.

I agree to that proposition also, provided the service performed in the case of the longer haul be *"similar"* to the service performed in the case of the shorter haul. It is difficult, however, to imagine a case where a carrier would charge less for a long than a short haul, unless the circumstances and conditions of the two hauls were substantially *dis*similar. Again: in the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens said:

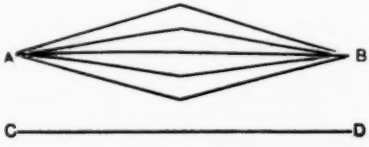
" Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, *for the presumption would always be* that the compensation charged for the service or thing is sufficient to be *reasonable."*

85 Fed. Rep., p. 115.

Again, he said:

" If, as I gather from the testimony, the through rates to Nashville afford a *fair* profit to the carriers, whether the Northern trunk lines or the respondents (*and it is reasonable to suppose they would not engage in the business without it*), there is substantial ground for contending that the same charge for carrying freight from the East to Chattanooga would afford a reasonable profit, and would therefore be a reasonable charge."

85 Fed. Rep., p. 115.



I agree that if the competition from A to B in the above dia-

gram be substantially similar to the competition from C to D, then the rates charged from A to B may fairly be compared with the rates charged from C to D. But if there be severe competition existing from A to B, and no competition existing from C to D, then I deny that any fair comparison can be made between the rates from A to B and those from C to D.

Suppose it should be shown that merchants are constantly in the habit of selling salt, domestics and other staple articles at one per cent. profit. It would be perfectly fair to compare the rates charged by one merchant upon *those* articles with the rates charged by another merchant *in the same town* upon the *same articles;* for it would be right to assume that if, for any reason, one merchant could afford to sell those articles at a certain profit, another merchant in the same town could afford to sell at the same profit; and the fact that the profits of both merchants on those articles were controlled by competition would not alter the case. But would it be fair to compare the profit which those merchants accepted on salt, domestics, etc., with their profit on fancy imported articles, and foreign dress goods? *In a word, it is fair to compare competitive rates with competitive rates; and it is fair to compare non-competitive rates with non-competitive rates; but it is not fair to compare competitive rates with non-competitive rates.*

When Judge Severens says that:

"The presumption would always be that the compensation charged for the service or thing is sufficient to be *reasonable;*" and when he says that the presumption is that through rates to longer distance points "afford a *fair* profit" or the carriers would not engage in the business; the correctness of his proposition depends entirely upon the meaning to be given to the words "reasonable" and "fair."

It may be said that a profit of one per cent. on salt, domestics

and other staple articles is a "reasonable" and "fair" profit on those articles, or the merchants "would not engage in the business" And the profit *is* in fact "fair" and "reasonable;" provided the merchant be allowed to charge higher profits upon fancy imported articles, dress goods, etc. A merchant is compelled to carry certain staple articles in stock in order to draw customers for his higher priced goods; and he can "fairly" and "reasonably" accept extremely low rates of profit upon his staple goods, rather than deplete his stock of such articles, and thereby drive away his custom. But if by the words "fair" and "reasonable," Judge Severens means that because a merchant accepts one per cent. profit upon staple articles, the presumption is that it is a fair and reasonable profit to be charged *upon all other articles sold by him;* and that he ought not to be allowed to exceed that profit upon any other article; then I respectfully dissent from his proposition. Any such rule of law administered in a case where a merchant was suing for articles sold and delivered, and no price had been previously stipulated, would destroy the mercantile business of this country. No court would think of charging a jury in a suit brought by a merchant to recover for the value of an imported lace shawl sold by him, that the jurors must, in ascertaining its value, restrict the merchant to the same rate of profit upon the shawl as that which he accepts on domestics, and other staple articles. The proposition of Judge Severens, referred to above, is plausible, and apparently logical, but in reality sophistical.

It may be put in syllogistic form, as follows:

1. Rates charged by a carrier to a longer distance point must be ***reasonably high.***

2. The rates charged by the appellees to the shorter distance points involved in these cases are higher than the rates charged by them to the longer distance points.

3. Therefore, the rates charged by them to the shorter distance points are *un*reasonably high.

The fault in the syllogism is to be found in the major premise. And it consists in stating a fact as being true under all circumstances, which, though it may be true under certain circumstances, is not true under other circumstances, and is not true under the circumstances of the particular case, in which the syllogism is invoked.

A similarly faulty syllogism would be the following:

1. Men are black.
2. George Washington was a man.
3. Therefore George Washington was black.

If a railroad has no competition to contend with, its own interests will induce it to charge according to distance.

In that case, rates charged by it to a longer distance point may properly be presumed to be reasonably high; and in that case, the major premise of the Commission's syllogism would be true.

But where severe competition exists at the longer distance point, whether the competition be between market and market, or between product and product, or between carrier and carrier, the presumption instead of being that the rates to that point are reasonably *high*, is that they are reasonably, or perhaps *un*reasonably *low*.

In the case of Smyth et al. vs. Ames et al., this Court quoted the following from Mr. Justice Brewer:

"It must be remembered that these roads are competing roads; *that competition tends to a reduction of rates*—sometimes as the history of the country has shown, *below that which affords any remuneration to those who own the property.*"

Smyth et al. vs. Ames et al., 169 U. S., p. 542.

In its Eleventh Annual Report, the Commission says:

"Rates to competing and distributing centers are not for the most part unreasonably high; they are frequently *quite low.*"

11 Ann. Rep., I. C. C. (1897), p. 14.

LXXXVI.

The First Section Continued.

If the low rates which prevail at competitive points are to be used as a standard for fixing the rates to non-competitive points, the rates on low class traffic will have to be used as a standard for fixing rates on high class traffic.

To illustrate my meaning: By reference to the Report and Opinion of the Commission in this case (Trans. No. 69, p. 23, right col.) it will be seen that the first-class rate from Cincinnati to Atlanta is $1.07 per hundred pounds, and the first-class rate from Cincinnati to Marietta is $1.27 per hundred pounds; showing that the first-class rate to Marietta exceeds the rate to Atlanta by 20 cents per hundred pounds; and 20 cents per hundred pounds is the greatest difference that exists in favor of Atlanta upon any of the classes of freight.

It will be seen from said Report and Opinion (Trans. No. 69, p. 23, right col.) that the rate from Cincinnati to Atlanta on Class D is 24 cents per hundred pounds, while the rate from Cincinnati to Atlanta on Class 1, is $1.07 per hundred pounds; making a difference in rates of 83 cents per hundred pounds in favor of Class D, as against Class 1, from Cincinnati to Atlanta.

Now, if the low competitive rates from Cincinnati to Atlanta are to be used as a standard for fixing rates to the non-competitive stations on the W. & A. Railroad, why is it that the low rates to Atlanta on Class D are not to be used as a standard for fixing the rates to Atlanta on the remainder of the thirteen

classes of freight? Why cannot the argument be made, that if railroad companies have, for a long series of years, carried traffic known as Class D from Cincinnati to Atlanta for 24 cents per hundred pounds, the presumption is that it has afforded them "a fair profit," or "they would not engage in the business;" and if 24 cents per hundred pounds affords "a fair profit" for carrying Class D from Cincinnati to Atlanta, the higher rates charged by them from Cincinnati to Atlanta upon the remainder of the thirteen classes of freight must be unreasonably high? And yet, if any one should seriously contend that the carriers of this country ought to be compelled to charge on the lower classes of traffic as high rates as are charged on the higher classes, the contention would be regarded as preposterous.

It is certain, however, that precisely the same fact which compels carriers to accept exceedingly low rates to *all* points on the *lower* classes of traffic, compels them to accept exceedingly low rates to *competitive* points on *all* classes of traffic; and the sole compelling fact in both cases is competition. The reason why low class traffic can only pay very low rates is because of competition between *product and product.* Wheat shipped from the Northwest to Atlanta comes into competition with wheat grown in Kentucky, Tennessee and Georgia; and therefore wheat from the Northwest must be carried at a sufficiently low rate to enable it to compete in Atlanta with wheat that is grown nearer to Atlanta. Again, if the rate charged upon wheat, added to its cost at the place of production, makes the selling price of wheat in Atlanta too high, as compared with corn, rye, etc., the amount of wheat consumed will diminish, and the deficit will be made up from corn, rye or other grain. In a word, the only reason why exceedingly low rates are charged upon the *lower classes* of traffic is that *competition* between *product and product* compels it; and the only reason why rates to Atlanta on *all the classes* are less than rates to the local stations on the W. & A. R. R., is that competition between railroad and railroad, and between

market and market, which exists at Atlanta, but does not exist at the local stations, compels it. If competition is to have the effect to reduce local rates to the level of competitive rates, it should also have the effect to reduce the rates on high class traffic to the level of low class rates.

LXXXVII.

The First Section Continued.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says:

"But it is to be remembered that the railroad business of the country is conducted by able men, animated, as it is right to suppose, with the desire to promote the interests of those whom they serve. Further to promote the efficiency of their work, the officers of the various companies have their associations for the purpose of comparing, studying and adjusting the rates of traffic on their several lines. *In the absence of the other party, they have everything their own way.* It would be expecting something not encountered or expected in other branches of business if we anticipated that they would assume a judicial attitude toward those with whom their business is to be done."

85 Fed. Rep., p. 112.

Judge Severens is correct in saying that railroad traffic managers are animated with the desire to promote the interests of those whom they serve. But experience has taught them that the most effective way to promote those interests is to promote the interests of the patrons of their roads. This is not attributing to railroad officials any charitable or benevolent motive. On the contrary, it is conceding that they are intelligently selfish.

The error of Judge Severens consists in the statement that

railroad traffic managers in studying and adjusting the rates of traffic on their several lines act "in the absence of the other party," and that "they have everything their own way." The error is quite popular, and it grows out of a want of familiarity with the practical method of rate-making in this country. *At the present day, it cannot be said that railroad traffic managers make their rates at all.*

So far as rates to and from *competitive* points are concerned, they are fixed inexorably, and absolutely, by competition. A traffic manager has nothing to do but to ascertain the rates which his rivals are offering to accept, and adopt, or closely approximate those rates, or abandon the competitive traffic.

As to rates to and from local stations, a railroad traffic manager in Georgia, and in many of the other States, is not only restricted by State railroad commissioners, but also by competition between product and product, and between market and market; which kinds of competition have a controlling influence upon the rates that can be charged to and from even the most strictly local stations, on a road. To illustrate: Cotton is raised on the lines of the W. & A. R. R.; the Georgia R. R.; and the A. & W. P. R. R.; and it is shipped from many of the local stations on those roads. But that cotton is raised and shipped in competition with cotton raised upon other railroads in Georgia; and in competition with cotton raised upon railroads in other States. The traffic managers of the W. & A. R. R., the Georgia R. R., and the A. & W. P. R. R. must accept such rates on cotton from their local stations as will enable that cotton to be carried and sold in the markets of the world in competition with cotton raised upon the lines of other railroads in Georgia, and in other States, or the cotton cannot be moved at all. In that event the W. & A. R. R., the Georgia R. R., and the A. & W. P. R. R., will lose the revenue that they might otherwise realize from the transportation of cotton from their local stations.

Again: If the cost of producing cotton, added to a certain rate charged for transportation, exceeds the price which can be obtained for cotton in the market, the cotton will not move from the local stations; and said railroads will lose the revenue which they might otherwise realize from its transportation. It is necessary, therefore, that the traffic manager acquaint himself, not only with the rates which other railroads are accepting for the transportation of cotton for similar distances, but also with the cost of producing cotton, and with the price at which it is selling; and this he cannot do without full consultation with the farmer who raises the cotton, and the merchant who buys it. The same is equally true of corn, wheat, and other grain, of live stock, and, in fact, of everything produced along the line of a railroad and shipped from its local stations. Whenever any of those products are offered for shipment at a local station, it is offered with full knowledge that its transportation must be conducted in competition with the transportation by other railroads of similar products, destined to common or competing markets; and such competition is as controlling, though not in the same degree, as that which exists at those cities where numerous rival lines of railroad intersect.

The Commission, in speaking of classifications made by railroad associations, says:

" But in these associations, when in session for the making of rates, each railroad official has, to some extent, had the district which was served by his road behind him; he has felt the pressure of the interests there, and contended for them as against the interests in classification represented by others, not only because it was desirable that the roads should favor the policy its patrons favored, but also *because the same policy was likely to be beneficial to both.*

" The result necessarily is that a classification made by a railroad association represents a series of compromises, *to which not*

only the railroads are parties, but in a certain sense business interests and sections of country also; these in many cases being admitted by their representatives to the consultations upon a subject so vitally concerning their interests, and allowed to present their views."

1 Ann. Rep., I. C. C. (1887), p. 31.

In an extract from Senate Report No. 1394, Finance Committee, second session, Fifty-third Congress, published by the Government under the title "Wholesale Prices, Wages and Transportation," it is said that:

"These are the general rules under which classifications are constructed, and while to a large extent controlling, classifications are, notwithstanding, in a great measure a series of compromises, *the participants of which are not alone the railroads, but also the shippers and representatives of business interests throughout the country, the latter being afforded ample opportunity to join with the railroads in the discussion as to the proper classification of articles of shipment affecting their interests.*"

Wholesale Prices, Wages and Transportation, p. 404.

Judge Severens is therefore in error, when he states that traffic officers in "studying and adjusting the rates of traffic on their several lines," act "in the absence of the other party and have everything their own way."

LXXXVIII.

The First Section Continued.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says:

"If railway carriers engage in a competitive struggle for business at a place where they meet and underbid each other, or other

carriers, to a point which is not in itself remunerative, can they turn back on the line, and taking advantage of the conditions existing at other localities, arising either from the fact that there is no opportunity for competition, or from the fact that by concert of the carriers there is none, charge such rates for the shorter haul as shall make good their lack of profit in competitive business, and even up the profits on their whole business to the point they set before themselves as reasonable? To the proposition thus roundly stated, no doubt counsel for the carriers would say that they could not contend for it, and yet this is the result reached by the not very indirect steps of the argument."

85 Fed. Rep., p. 115.

I respectfully deny that the argument of "counsel for the carriers" either directly or indirectly leads to any such proposition as the Judge stated so "roundly."

In Section XLIV. of this argument, I stated what I regarded as the reasonable limitations imposed upon carriers in exercising the privilege of taking into consideration competition as one of the circumstances and conditions affecting transportation; and one of the limitations conceded by me was that the rates accepted by carriers on traffic to the longer distance competitive points *must yield some profit* (though it may be very small) over the additional cost of the movement of that traffic. The limitation is directly opposed to the idea that carriers may "engage in a competitive struggle" . . . "to a *point which is not in itself remunerative.*" If the rates accepted to Atlanta and Opelika, the longer distance competitive points, yield *any* profit over *the additional cost of the movement of that traffic,* they are "remunerative" to some extent, though the remuneration may be very slight.

Another limitation conceded by me in Section XLIV. of this argument is that the rates charged by carriers to the shorter distance points must not be unjust or unreasonable, within the

purview of the first section of the Act. Now, if those rates be just and reasonable, within the purview of that section, how can it be truthfully said that the appellee carriers "turn back on the line" and "take advantage" of the conditions existing at such points? If the rates to the shorter distance points be in fact just and reasonable, the carriers, in charging them, are in no sense "taking advantage" of the persons who pay them. If the rates charged by the carriers to the longer distance competitive points are remunerative to any extent, however small it may be, there is no "loss" sustained by the carriers in the transportation of the longer distance traffic; and therefore there is no occasion for them to "even up," by increasing their shorter distance rates.

If Judge Severens means that railroads must charge at competitive points, the same rate of profit as is charged at non-competitive points, then they must abandon competitive traffic altogether. If he means that railroads must accept upon non-competitive traffic whatever rate of profit they may be forced to accept upon competitive traffic, then the Southern railroads must go into bankruptcy; because they can no more afford to carry all of their traffic at the low rate of profit which they are forced to accept at competitive points, than a merchant can afford to sell his entire line of goods at the same rate of profit which he is forced to accept upon certain staple articles.

LXXXIX.

The First Section Continued.

In Sections LXXXV. and LXXXVI. of this argument, I commented upon the proposition contended for by the appellant, to the effect that the presumption is that the rates charged by carriers to longer distance points yield a reasonable profit, and

therefore that higher rates charged to shorter distance points must yield an unreasonably high profit.

Counsel for the appellant, in his argument in the court below, contended for another proposition, which is entirely different from, and inconsistent with, the proposition upon which I commented in those sections.

The other proposition is:

That the rates to Atlanta and Opelika are unreasonably low, because they do not pay operating expenses, and, in addition, *interest on bonds, other fixed charges, and dividends;* and therefore that part of these burdens which should be borne by Atlanta and Opelika traffic are placed upon traffic to the shorter distance non-competitive or local stations,—*thus rendering the latter's rates excessive in themselves.*

It is true that the rates to Atlanta and Opelika do not pay their full proportion of "operating expenses;" that they do not pay anything toward "interest upon bonds," and other "fixed charges;" and, of course, it is true, that they do not pay anything toward reasonable "dividends."

It is also true that the Atlanta traffic ought to pay, provided it could be compelled to do so, its full proportion not only of "operating expenses," but also of "interest," other "fixed charges," and "dividends."

It is also true that to the extent that the Atlanta and Opelika traffic fail to pay their full proportion of "operating expenses," "interest," other "fixed charges," and "dividends," those burdens have to be placed upon traffic to the shorter distance non-competitive stations; *or they have to be borne by the stockholders of the companies.* And such burdens upon stockholders have been so great in Southern territory as to cause the utter bankruptcy of many railroad companies. I have shown in Section LXXXVII. that there are many reasons why the rates to the

shorter distance non-competitive stations cannot be increased to such an extent as to render them "excessive in themselves."

If then, the shorter distance rates are not "excessive in themselves," the question arises whether the Atlanta and Opelika rates are illegal, merely because competition at those points has reduced them so low, that while they pay something more than "the additional cost of movement" of the Atlanta and Opelika traffic, they cannot be made high enough to pay their fair proportion of "operating expenses," "interest" on bonds, other "fixed charges," and "dividends."

The present proposition for which counsel contends can be put in syllogistic form, as follows:

1. Rates charged to longer distance competitive points do *not* yield reasonable compensation for the service performed by the carrier.

2. The loss sustained by the carrier on traffic to longer distance competitive points is made up by increasing the rates to shorter distance points.

3. Therefore carriers ought not to be allowed to charge less for a longer, than for a shorter distance, over the same line, in the same direction, etc.

The first fault in this syllogism is to be found in the major premise; and it is the fault of indefiniteness. How are we to decide what is a *"reasonable"* compensation for transportation to a *competitive* point?

My contention is, that if *competitive* rates will pay anything over and above *"the additional cost of movement"* of the competitive traffic, it is right and *reasonable* that they be accepted by the carrier, rather than abandon the competitive traffic.

On the other hand, counsel for complainant contends that

competitive rates ought to be sufficient to pay not only the *"additional cost of the movement,"* of the competitive traffic, but also the full proportion of that traffic toward "operating expenses," "interest," and other "fixed charges," and "dividends."

Counsel's proposed method of rate construction is correct in theory; and it would be followed by every railroad traffic manager in the country, if it were practicable to do so. But the utter impracticability of constructing rates upon the theory contended for by counsel was demonstrated by the Commission itself, in 1887 in Re Southern Railway & Steamship Association (sometimes cited as in Re Louisville & Nashville Railroad Company). In that case, the Commission said:

"This distinction between *the cost of movement* and *the fixed charges* often becomes of importance in such cases as that of the lumber trade just mentioned. That trade is new; the roads which take it were built without anticipating its springing up, and their managers made their calculation for business to meet the whole cost of operation in reliance upon such traffic as was then apparent or probable. The *fixed charges* of the road may, for purposes of illustration, be assumed to equal one-half of the whole, *the cost of movement* of freight the other half. The rates laid were doubtless calculated to cover the whole, with a margin for profit, and were so laid that all traffic would contribute toward both *fixed charges* and *cost of movement.* But now comes this new business, and from the nature of the case low rates are a necessity to it; it can pay perhaps little if anything more than half what is paid by other traffic. But taking it will not increase perceptibly *the fixed charges* of the road, because those are made up of the items that must be paid whether the traffic is large or small. What is added to the cost by taking it *is simply the expense of its own handling and movement;* and upon the supposition made, there might perhaps be gain to the road instead of loss, in taking it at anything above half the rates which are levied upon other traffic corresponding to its classifi-

cation. *It might, therefore, be carried at such rates without* wrong to any one."

1 Interstate Commerce Rep., p. 284, right col., In Re Southern Ry. & S. S. Association.

What is said by the Commission in reference to the lumber trade, is equally applicable to all the lower kinds of freight, such as iron ore, stone, sand, brick, cement, pig iron, etc. If the courts once hold that each and every kind of traffic must be charged such rates as will pay not only the "additional expense incurred" by the carrier in the transportation of that particular kind, but also the full proportion which such traffic ought to contribute toward all the "operating expenses," "interest," other "fixed charges," and "dividends," then *the courts will put an absolute embargo upon more than half of the tonnage now carried by the railroads of this country.*

The Commission in its First Annual Report to Congress said:

"It was very early in the history of railroads perceived that if these agencies of commerce were to accomplish the greatest practicable good, the charges for the transportation of different articles of freight could not be apportioned among such articles by reference to the cost of transporting them severally, for this, if the apportionment of cost were possible, would restrict within very narrow limits the commerce in articles whose bulk or weight was large as compared with their value. On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added."

See First Annual Report Interstate Commerce Commission.

What is said by the Commission with reference to the impracticability of apportioning the charges for the transportation of different articles of freight among such articles by reference to the cost of transporting them, severally, is equally applicable to the theory that the charges for the transportation of competitive and non-competitive freight ought to be apportioned between them by reference to the cost of transporting them, severally. The reason why low-grade traffic cannot be made to pay in proportion to the cost of its transportation, is, as the Commission properly states, because the charge for carriage would be greater than it could bear. And the reason why *competitive* traffic cannot be made to pay in proportion to the cost of transporting it, is because the charge for carriage upon that basis by the longer line would ordinarily be greater than by the shorter line; the longer line would, therefore, be driven out of competition; the shorter line would secure a monopoly, and all competition would be destroyed.

The second fault in the syllogism is to be found in the minor premise. In that premise it is erroneously assumed that a *loss* is sustained by the appellees on the Atlanta and Opelika traffic. But if the Atlanta and Opelika rates pay anything over and above the "additional cost of movement," so far from there being any *loss* to the appellees on the Atlanta and Opelika traffic, there is a "margin of *profit*" *in carrying that traffic.* In other words, *there is no loss at all.*

The real ground of counsel's present objection is, that the margin of profit is not as great as it should be; and the answer to the objection is, that the profit, however small it may be, which the appellees may derive from the Atlanta and Opelika traffic, enables it to improve and increase its facilities for handling the shorter distance traffic, as well as the other traffic on its main line.

The third and greatest fault in said syllogism is to be found

in the conclusion which is sought to be drawn from the major and minor premises.

If it be true that rates charged to longer distance competitive points do not yield proper compensation; and if it be true that their failure to do so causes a loss to the carrier, it is manifest that if the rates to the shorter distance points be reduced to the same as the rates to the longer distance points, *the loss to the carrier will be increased, instead of being diminished.* In other words, if the Courts compel carriers in the Southern territory to accept to their non-competitive stations rates as low as those which competition compels them to accept to longer distance competitive points, the result must be a disastrous loss of revenue to the Southern railway system.

In the cases at bar, the following language was used by the Court of Appeals:

"There may be a wide difference between a rate or amount of compensation that would give full remuneration for the service in carrying the competitive traffic, and that remuneration therefor which competitive conditions will allow the carrier to receive. The full measure of reasonable remuneration to the appellees for the carriage of competitive freight to Atlanta would require a rate sufficient to pay not only the additional cost of moving the competitive traffic, but also that proportion of operating expenses, fixed charges, and reasonable profit to the owners of the carrier lines which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier. And that rate would, doubtless, be applied and enforced if the circumstances and conditions permitted it to be done. But as no higher rate than a full compensatory one should be applied and enforced under the most favorable circumstances and conditions, it is manifest that it cannot be applied to traffic that is subject to severe competitive conditions."

I. C. C. vs. W. & A. R. R. Co. et al., 93 Fed. Rep., p. 90.

XC.

The First Section Continued.

Suppose it be conceded "that the Atlanta and Opelika rates are unreasonably low," in the sense that they do not pay, in addition to "cost of movement," their full proportion of "operating expenses," "interest," other "fixed charges," and "dividends," how is it to be remedied except by stifling the competition, which has reduced those rates to their present level?

If the railroads at Atlanta and Opelika were to agree to cease their competition at those points, the Atlanta and Opelika rates would, in all probability, become higher than the shorter distance rates; but would such an agreement be lawful?

The fifth section of the Act to Regulate Commerce expressly prohibits every contract, agreement or combination for pooling; and pooling was prohibited because it was supposed to have a tendency to stifle competition.

In the case of Ex Parte Koehler, Judge Deady said:

"The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will, and must, send and receive freight at lower rates than others not so favored."

31 Fed. Rep., p. 321, Ex Parte Koehler.

Now if it be true that places between which competition in transportation exists always will, and must, send and receive freight at lower rates than others not so favored, it is impossible to prevent such competitive rates from becoming so low, that in many instances, while they may pay more than the "additional cost of movement," they will not pay anything toward "interest," other "fixed charges," and "dividends,"—unless the car-

riers enter into a contract, combination or conspiracy to limit or stifle the competition,—a thing which they are forbidden by law to do.

XCI.

The First Section Continued.

Suppose it be conceded that the Atlanta rates are "unreasonably low," in the sense that they do not pay, in addition to "cost of movement," their full proportion of "operating expenses," "interest," other "fixed charges," and "dividends," what provision of law is violated by accepting them?

The first section of the Act to Regulate Commerce provides that all charges, etc., "shall be reasonable and just." If the word "reasonable" had been construed to mean reasonably high, as well as reasonably low, then it would have been unlawful to accept rates which are "unreasonably low." The Commission, however, has held that the word "reasonable," as used in the first section in reference to rates, means reasonably low, but not reasonably high; and that the Commission has no power to order competitive rates to be advanced, even where they are so low "that persistence in making them would be ruinous."

In construing the word "reasonable," as used in the first section, the Commission said:

"There is consequently no little force in the claim made by respondent that charges are not reasonable and just, when they are so low as to be unremunerative to the carrier—so low that its action in continuing to make them would lead directly to bankruptcy. Possibly if the statute were to be interpreted without any aid from its history, and with no other knowledge of its purposes, aims and ends than such as may be derived from its provisions, a holding that a rate unreasonably low was forbidden

might be justified, or at least might be urged upon plausible argument.

But every statute is to be read in the light of its history and of the evils it was intended to redress."

After discussing the history of the statute and its purposes, the Commission said:

"If such was the primary purpose of the statute, as unquestionably it was, then the proper meaning of the term "just and reasonable," as employed in it, is apparent. They were employed to establish a *maximum* limitation for the protection of the public, *not a minimum limitation* for the protection of reckless carriers against their own action."

2 I. C. Rep., pp. 146, 147, In Re C., St. P. & K. C. R. Co.

The fact, therefore, that the Atlanta and Opelika rates may be "unreasonably low in themselves," in the sense above referred to, constitutes no violation of the first section of the Act; and it constitutes no violation of the third or fourth sections, unless it can also be shown that the shorter distance rates are "unreasonably *high*, in themselves."

I have herein shown that the shorter distance rates are not unreasonably high; but on the contrary are unreasonably low.

XCII.

The First Section Continued.

It is stated by the Commission that the railroad classifications now in use in this country embrace from five thousand to seven thousand items.

11 Ann. Rep., I. C. C. (1897), p. 66.

The classification which is used by the appellees divides those five thousand or seven thousand items into thirteen classes, and designates them as classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, F, H.

The rate on class 1 is more than four times as much, per hundred pounds, as the rate on class D, notwithstanding both of those classes of freight may be carried for the same distance, over the same railroad, in the same train, and even in the same car.

If it be held that a rate is unlawful, because it is unreasonably *low*, in the sense that it fails to pay "interest," other "fixed charges," and "dividends," it must be held that a rate is unlawful, as being unreasonably *high*, because it pays more than "interest," other "fixed charges," and "dividends."

If the rate on class 1 pays more than "cost of movement," "interest," other "fixed charges," and "dividends," I suppose it is to be held to be unlawful, because it is unreasonably *high*. But if the rate on said class 1 pays no more than "cost of movement," "interest," other "fixed charges," and "dividends," it is manifest that the rate on class D, which is less than one-fourth of the rate on class 1, must fall very far short of paying "interest," other "fixed charges," and "dividends," in addition to the "cost of movement," and I suppose that it must be held to be unlawful, because it is unreasonably *low*.

Are we to assume that each and every rate is unlawful because it pays either more or less than the cost of movement, interest, other fixed charges, and dividends?

Class 1 may embrace dry goods; while class D may embrace grain. In fixing the rates upon dry goods, and grain, respectively, no consideration was given to the question as to whether the rates either upon dry goods, or grain, paid more or less than the "cost of movement," "interest," other "fixed charges," and "dividends." The traffic managers had sufficient intelli-

gence to know that it is an utter impossibility to ascertain exactly what any particular rate pays; and therefore, instead of trying to construct a tariff upon an impracticable and theoretical basis, they undertook to construct one upon a practicable, common sense, commercial basis. They knew that it does not cost a railroad company materially more to carry one hundred pounds of dry goods, than it costs to carry one hundred pounds of grain, a given distance. They knew that grain could not be moved at all, if it were charged such rates per hundred pounds, as would be perfectly fair and reasonable for the transportation of dry goods an equal distance; therefore, without regard to the element of cost, they fixed the rate upon grain at less than one-fourth of the rate which they fixed upon dry goods. They knew that they can afford to carry grain at a rate which may fall short of paying the "cost of movement," together with "interest," "fixed charges" and "dividends;" provided they can charge upon dry goods a rate which may pay something more than the "cost of movement," together with "interest," other "fixed charges" and "dividends." If the farmer's grain be carried, at less than cost, he can very well afford to pay something more than cost, for the transportation of such dry goods as may be used by himself and his family.

All Freight Tariffs are based upon commercial considerations,—without attempting to ascertain or consider the relative cost of moving the various articles assigned to the different classes.

I have heretofore quoted the following from the First Annual Report of the Interstate Commerce Commission:

"On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring different sections into more intimate business and social relation, could never have

grown to any considerable magnitude, and in some cases, could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded because the charge for carriage would be greater than it could bear. On the other hand, the rates for the carriage of articles which within small bulk or weight concentrate great value would on that system of making them be absurdly low; low when compared to the value of the article, and perhaps not less so, when the comparison was with the value of the service in transporting them."

1 Ann. Rep., I. C. C. (1887), pp. 30, 31.

Where severe competition exists, as at Atlanta and Opelika, it is impossible for carriers to be controlled, either by the relative cost, or the relative value of the service; because each must accept the lowest rate offered by any one of the competing lines, or all, except one, must abandon the competitive traffic.

If it be held that it is unlawful for carriers to accept competitive rates which do not pay "interest," other "fixed charges," and "dividends," in addition to cost of movement, it will as certainly prevent the carriage of competitive traffic, as the application of the same principle will prevent the transportation of low grade traffic, which probably constitutes two-thirds of the railroad tonnage of this country.

XCIII.

The First Section Continued.

It was said by the Court of Appeals in the cases at bar that:

"As no higher rate than a full compensatory one should be applied and enforced under the most favorable circumstances

and conditions, it is manifest that it cannot be applied to traffic that is subject to severe competitive conditions."

I. C. C. vs. W. & A. R. R. Co. et al., 93 Fed Rep., p. 90.

To paraphrase the language just quoted, it is manifest that rates, such as the shorter distance rates in these cases, cannot be applied to traffic that is subject to severe competitive conditions, such as is the Atlanta and Opelika traffic.

The local traffic of a railroad is the only traffic upon which it can rely, with any degree of certainty, to yield the revenue necessary to pay operating expenses, and a fair return upon the value of that which it employs for the public convenience. A railroad company has the right to so adjust its local rates as that, in connection with such revenue as it may be able to secure from competitive traffic, they will pay operating expenses, fixed charges, and a fair return upon the value of the investment. Such local rates are no more than fairly compensatory, and therefore they are not unreasonably high in themselves. A basis of local rates so adjusted is always higher per ton per mile than can be obtained upon traffic that is subject to severe competitive conditions; and if carriers are to be prohibited from accepting less rates on severely competitive traffic than they are compelled to charge upon their local traffic, they must necessarily abandon the competitive traffic—and whenever they do so, railroad competition in this country will, of course, be at an end.

XCIV.

The First Section Continued.

Counsel for appellant in the court below quoted the following from the opinion of this Court in Smyth vs. Ames, 169 U. S., p. 541, known as the "Nebraska Maximum Rate Case:"

"Nor can the carrier justify unreasonably high rates on domestic business, upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business."

If the word "local" be substituted for the word "domestic," and the word "competitive" be substituted for the word "interstate," the application, which counsel desires to make of the language quoted, will be obvious.

The quotation, however, has no application, because in the cases at bar, the appellees do not seek to justify "unreasonably high rates" on their local business. They insist that the shorter distance rates are not "unreasonably high." They also insist that the Atlanta and Opelika traffic is not carried at "a loss." The uncontradicted testimony in this case is, that Atlanta and Opelika traffic pays something more than the cost of its movement; a fact which demonstrates that instead of its being carried at a loss, it is carried at a profit, though the profit may be very small. The appellees therefore have no occasion to justify the shorter distance rates upon the ground that they are necessary to meet losses incurred by reason of their acceptance of the Atlanta and Opelika rates.

XCV.

The First Section Continued.

The Atlanta and Opelika rates are fixed absolutely by competition, which prevents the appellees from securing at that point rates which are fully compensatory. And the question recurs, though in a slightly different form, whether competitive rates are unreasonably low, within the purview of the law, simply because

higher rates might reasonably be charged, if competition would permit.

In the language of the Court of Appeals in the cases at bar:

"What is a reasonable action or a reasonably remunerative rate for carriage at a given time and place necessarily has relation to the circumstances and conditions bearing upon the actor or upon the carrier at the time and place."

93 Fed. Rep., p. 91, I. C. C. vs. W. & A. R. R. Co. et al.

The circumstances and conditions bearing upon the carriers at Atlanta and Opelika compel them to accept rates, which, while they do not pay anything toward "interest," other "fixed charges," or "dividends," do pay more than the cost of movement of the Atlanta and Opelika traffic, and therefore yield some profit, though it may be very small. I contend that such rates, so forced upon the carriers by competition, are reasonable, within the purview of the law, notwithstanding very much higher rates would also be reasonable, if the circumstances and conditions at Atlanta and Opelika were such that the carriers could obtain higher rates than those which they now accept. The error of counsel for the appellant consists in supposing that in order for a rate to be reasonable, it must be represented by some fixed and invariable amount; whereas the truth is the amount of a reasonable rate not only may, but should, vary with the circumstances and conditions under which it is charged, or accepted.

XCVI.

The First Section Continued.

Counsel for appellant, in the Court below, contended that:

If the rates to competitive points are reasonably high, notwithstanding competition, then competition is no justification for a greater charge for the shorter haul.

Competition is not relied on in this case as a justification for a greater charge to the shorter distance points. It is relied upon as a justification of a lesser charge for the longer haul to Atlanta and Opelika.

Rates to competitive points may be reasonably high, considering the competitive circumstances and conditions under which they are accepted, and yet they may be so low as not to be *fully* compensatory, though they may yield *some* profit over and above the additional cost of the movement of the competitive traffic. In such a case I contend that the competition, which forces the acceptance of rates which, though reasonably high under the circumstances and conditions under which they are accepted, might reasonably be materially higher, were it not for the competition, does justify a lesser charge for the longer haul to a competitive point, like Atlanta or Opelika, than for the shorter haul to an intermediate local point.

XCVII.

The First Section Continued.

Counsel for appellant, in the Court below, contended that Cincinnati, New York, and other markets compete with each other in the sale of goods at the shorter distance points, as well as at Atlanta and Opelika. The fact is conceded; but in their competition, they recognize and act upon the fact that the rates to the shorter distance points are higher than those to Atlanta and Opelika; and so far as this record shows, none of those competing markets have ever demanded, or even requested that the rates to the shorter distance points shall be made as low as those to Atlanta and Opelika.

I also concede that the same lines of transportation that compete for business from the East and West to Atlanta and Opelika, compete for business to the shorter distance points; but in

their competition, they recognize and act upon the fact that the rates to the shorter distance points are higher than the rates to Atlanta and Opelika; and so far as this record shows, none of those lines of transportation have ever demanded, or even requested that the rates to the shorter distance points be made the same as the rates to Atlanta and Opelika.

XCVIII.

The Power of This Court to Modify the Order Made by the Commission.

Counsel for appellant will contend that this Court "may modify the orders of the Commission, or make such new or different orders as, under the law and 'the entire body of the evidence' may, in the judgment of the Court, be just and proper."

In the case of I. C. C. vs. Detroit, G. H. & M. Ry. Co., it was said by Judge Severens in his dissenting opinion, as follows:

"The Court is not authorized to make any general order or decree upon the matters at large as they shall appear before it, but is given power simply to award its process if it judicially approves the order of the Commission. If it does not find it to have been warranted by law, its power and duty are at an end."

57 Fed. Rep., 1013, 1014.

He also used the following language: "But, as already said, the Court can make no new order. The order of the Commission stands or falls as made."

57 Fed. Rep., p. 1019.

See also 83 Fed. Rep., p. 267, Farmers' Loan & Trust Co. vs. N. P. Ry. Co.

The proposition thus announced by Judge Severens was af-

firmed by the U. S. Circuit Court of Appeals for the Sixth Circuit, in 74 Fed. Rep., p. 805. The fourteenth head-note of the opinion of that Court is as follows:

"The power given to the courts to compel obedience to the 'lawful order' of the Commission being special and statutory, is strictly limited to the power conferred; and consequently the courts can only grant or refuse compulsory obedience to the order, and have no authority to modify or change it."

74 Fed. Rep., p. 805, D. G. H. & M. Ry. Co. vs. I. C. C.

It is true that the proposition as announced by Judge Severens, and affirmed by the Court of Appeals, was not referred to in the opinion of this Court in I. C. C. vs. D., G. H. & M. Ry. Co., 167 U. S., p. 633. But this Court said nothing in disapproval of the proposition.

In the case of I. C. C. vs. D. L. & W. R. Co. et al., in the Circuit Court for the Northern District of New York, Wallace Circuit Judge, in speaking of the power of the Circuit Court, said:

"The Court cannot substitute, for an order actually made, one such as the Commission might or should have made, or such as the Commission intended to, but failed to, make. This Court has no revisory power over the orders of the Commission. Its function in a proceeding like this is merely to inquire whether the respondents, the common carriers, have refused or neglected to perform any lawful order or requirement of the Commission. It cannot undertake to decide whether the respondents have violated one which the Commission might have lawfully made. It is not a violent presumption that if the order had been, in terms, one such as the Commission intended to make, the respondents would have contested its propriety, and refused to obey it. But such an issue is not here. As framed, the respondents, in my judgment, were justified in refusing to obey it."

I. C. C. vs. D. L. & W. R. Co., 64 Fed. Rep., p. 723.

Counsel for appellant may refer to the following language in the opinion of the Circuit Court in what is known as the "Social Circle cases."

"The Commission denied the power of this Court to hear the case upon any other issues, pleadings, or facts, than those presented to the Commission. It is claimed that the case is to be determined with reference to what the Interstate Commerce Commission had before it, and that no additional issues or questions should be raised, or other evidence taken. The language of the act of Congress does not support this contention. . . . This question may be considered, therefore, as settled, not only by the language of the act of Congress, but by authority, against the position assumed by counsel for the Commission."

I. C. C. vs. C. N. O. & T. P. Ry. Co., 56 Fed. Rep., pp. 934, 935.

In the "Social Circle case," counsel for the Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in that case. The question with reference to which the language just quoted was used by the Court, was whether the Circuit Court, in its examination into the legality of an order, as made by the Commission, was restricted to the pleadings and evidence used before the Commission, or could consider new and additional evidence taken for the first time in the Circuit Court.

Counsel for appellant may quote the following language from the opinion of this Court in the case of Interstate Commerce Commission vs. Alabama Midland Ry. *et al.*, 168 U. S., p. 175, viz.:

"It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal in such cases that they *are not restricted to the evidence adduced before the Commission,* nor

to a consideration merely of the power of the Commission to make the particular order under question, but that *additional evidence may be put in by either party*, and that the duty of the Court is to decide, as a Court of Equity, upon the entire body of evidence."

It is as true of the "Alabama Midland Case," as it is true of the " Social Circle Case," that counsel for the Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in either of those cases. The question with reference to which the language above quoted was used by the Court in both cases, was, whether the Circuit Court, in its examination into the legality of an order as made by the Commission, was restricted to the pleadings and evidence used before the Commission, or could consider new and additional evidence taken for the first time in the Circuit Court.

Counsel for appellant may quote the following language from the opinion of Judge Sage in I. C. C. vs. C. N. O. & T. P. Ry. Co. et al., known as the " Cincinnati and Chicago Freight Bureau Cases," viz.:

" The Court is to sit as a court of equity, without the formal proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises. It is so provided in section 16 of the act. The intention of Congress evidently was to vest in the Court a large discretion."

64 Fed. Rep., pp. 984, 985.

In those cases, counsel for Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in those cases. The question with reference to which the language above quoted was used by the Court was whether the Circuit Court, in its examination into the

legality of an order as made by the Commission, could consider a transcript of the testimony taken before the Commission as a part of the record. See 64 Fed. Rep., p. 983. His Honor held that though the testimony taken before the Commission was not a part of the record, either party should be allowed to use as evidence any testimony taken before the Commission, which is competent and relevant. Such action was regarded by the Court as a proper exercise of the "large discretion" vested in it by the Act; and it was considered by the Court as doing "justice in the premises" to allow either party to use the testimony taken before the Commission, though it was not technically a part of the record. The question as to whether the Court had power to modify an order made by the Commission, or to make a new order of its own, was not discussed by counsel nor considered by the Court in those cases.

Counsel for appellant may quote the following language used by Judge Lurton in the case of Shinkle Wilson & Kreis Co. vs. L. & N. R. R. Co. et al., 62 Fed. Rep., p. 693, viz.:

"If it shall then appear, on all the evidence heard and submitted, that the order of the Commission *was lawful* and reasonable, and that it has been violated, it shall be lawful for such Court to issue a writ of injunction, or other proper process, to prevent further disobedience of such order. Now, it is well settled that the Court is not the mere executioner of the orders of the Commission. The suit in this Court is an original and independent proceeding. This Court is not confined to a mere examination of the matter as heard by the Commission. It proceeds to hear the complaint *de novo.*"

In that case, counsel for the complainants did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in that case. The question with reference to which the language just quoted was used by the

Court, was whether the Court was bound to issue a *preliminary* injunction to compel a carrier to obey an order made by the Commission in reference to freight rates, where the answer of the carrier denied that said rates were unreasonable or unjust, and denied the legality of said order.

Counsel for appellant may quote the following language from the opinion of this Court in the case of I. C. C. vs. Alabama Midland Ry. Co. referred to above:

"Much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be *reviewed* by the Court. The provisions of section 16 of the Act, which authorize the Court to 'proceed to hear and determine *the matter* speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner *as to do justice in the premises,* and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the Court may think needful, to enable it to form *a just judgment in the matter of such petition,' extend* as well to an inquiry or proceeding *under the fourth section* as to those arising under the other sections of the Act."

The italics are mine.

In using the language just quoted, this Court was not discussing the question as to whether the Circuit Court can modify or change an order as made by the Commission; and therefore, it had no idea of disapproving the proposition announced by Judge Severens, and affirmed by the Court of Appeals in the case of I. C. C. vs. D. G. H. & M. Ry. Co. referred to above.

In using the language just quoted from the opinion in the Alabama Midland Ry. case, this Court was merely combating an argument which had been pressed upon it by counsel for the Commission to the effect that *under the fourth section,* the action

of the Commission was conclusive, and could not be reviewed by the courts at all. This Court decided however, that the power of *review* by the courts extends "as well to an inquiry or proceeding *under the fourth section*, as to those arising under the other sections of the Act."

168 U. S., p. 174.

The power of *"review"* referred to by this Court, is confined to a "review" of the question as to whether the order as made by the Commission is lawful. If upon such a "review," the Court finds that the order is lawful, it awards its process to enforce it. If upon such "review," the Court finds that the order as made is not warranted by law, the power and duty of the Court are at an end.

"The matter" which the Court is authorized to *"hear and determine:"* and *"the premises"* in which the Court is to *"do justice:"* and *"the matter of such petition"* in which the Court is "to *form a just judgment,*" all mean one and the same thing, viz., "to hear and determine," and "to form a just judgment" on, the question whether the order *as made by the Commission, is lawful*, or not.

The sixteenth section of the Act to Regulate Commerce provides that whenever any common carrier shall refuse or neglect to perform "any *lawful* order or requirement of the Commission," the Commission, or any one else, may apply to the Circuit Court of the United States, and said court "shall have power to hear and determine the matter" "speedily as a court of equity," "in such a manner as to do justice in the premises." The Court may prosecute all such inquiries as may be needful to enable it "to form a just judgment in the matter of such petition;" and if it be made to appear to such court on such hearing or on report of any such person or persons, that the *lawful* order or requirement of said Commission drawn in question, has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, etc."

It will be seen that the jurisdiction of the Circuit Court, *under section 16,* is confined to the enforcement of a LAWFUL order made by the Commission; and that said court is not authorized to make a new order of its own.

I concede that the Commission may assign an erroneous reason for making an order, and yet the order may, for other reasons, be lawful; and that, in such case, it is the duty of the Court to enforce it; but I contend that the Court has no power to enforce an order of the Commission which is *not* lawful; or to make an order of its own, under section 16, which is *substantially* different from the order made by the Commission.

Under sections 8 and 9 of the Act to Regulate Commerce, any one who complains that the Act has been violated by a common carrier is given an action for damages in the courts of the United States. But if instead of resorting to those courts, he elects to apply to the Commission, as he may do under section 16, he must be prepared to maintain the *lawfulness* of such order as the Commission may make in his behalf; or he cannot demand of the Circuit Court an enforcement of the order.

Section 9 provides that any person shall have the right to pursue his remedy in court, or his remedy before the Commission; but that he shall not have the right to pursue both remedies. According, however, to the contention of counsel for the appellant a party may elect to apply to the Commission, and having obtained an order from it he may, under section 16, apply to the Court for an enforcement of the order; and, notwithstanding the Court may be of the opinion that the order of the Commission is unlawful, it is the duty of the Court to give to the party all the relief to which he would have been entitled, if he had, in the first instance, applied to the Court under sections 8 and 9 of the Act. If the contention of counsel be correct, the party, instead of being forced to elect between the Commission and the

Court, obtains the advantage of the jurisdiction of the Court, as well as that of the Commission.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens did not hold that the Court had the right to "modify the order of the Commission" or to make a "new or different order" of its own. Speaking of the order made by the Commission in that case, he said:

"The legal reason given may be wrong and the order right, if upon the facts, the latter (i. e., the order) should be found by the Court TO BE WARRANTED BY LAW. Nor would it affect the duty of the Court if the Commission had founded its order upon one provision of the Act, and the facts brought the case within some other. THE QUESTION, THEREFORE, IS WHETHER THE ORDER MADE WAS A LAWFUL ONE *in the circumstances as they are made to appear.*"

85 Fed. Rep., p. 110.

In the case just cited, Judge Severens did not "modify the order of the Commission," nor did he make a "new or different order" of his own. On the contrary, he "ordered, adjudged and decreed that *the order* MADE BY THE INTERSTATE COMMERCE COMMISSION be in all things affirmed and made the order of this Court," etc.

In his argument in the Court below counsel for appellant said:

"The orders of the Commission, as we have seen, are simply that the rates to the shorter distance points shall not be higher than the rates to the longer distance point, *and it is left to the discretion of the carriers to comply with these orders by advancing the rates to Atlanta and Opelika,* or by reducing the rates to the shorter distance points, or by both such advance and reduction in certain proportions."

Again he said:

"It would appear, however, that the orders of the Commission should be complied with by reducing the rates to the shorter distance points, *and not by advancing the rates to the longer distance points.*"

If I understand the object of the extract last quoted, counsel expects to ask this Court to materially modify the order of the Commission, or rather to make a new order of its own. In this: that whereas under the order of the Commission, the appellees are given the option, either to advance the rates to Atlanta and Opelika, or to reduce the rates to the shorter distance points, this Court will be asked to take away from them that option, and to order that they shall, in no event, make any advance in the rates to Atlanta or Opelika.

For the reasons above set forth in this section, I submit that this Court can neither make any such material modification of the Commission's order, nor make any such new order of its own.

Respectfully submitted,

ED. BAXTER,

Solicitor for Appellees, as of Record.